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Harvey L. Strayhan

RECENT LEGISLATION ON SCHOOL SEGREGATION
William F. Winter

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Mississippi Law Journal

VOLUME XXVIII MARCH, 1957 NUMBER 2

EXPRESS PROVISIONS OF THE MODERN OIL AND GAS LEASE IN MISSISSIPPI

*Harvey L. Strayhan**

Upon the suggestion of a leading member of the Mississippi Bar, the writer has attempted herein to discuss, from a practical rather than an academic standpoint, the express provisions of the standard commercial oil and gas lease, citing, when available, the appropriate Mississippi decisions affecting these provisions, with the aim and for the purpose of affording practitioners in this great state, where oil and gas law is still somewhat in its formative stage, the opportunity of evaluating the authorities of other states in light of the requirements of their own oil and gas practice. This article will necessarily treat with the fundamentals of the oil and gas lease and, as such, appear somewhat commonplace to those specializing in the oil and gas law. Nevertheless, it is hoped that this discussion will be of convenience or service to the general practitioner in this state.

Since the consideration of all types of mineral leases would lengthen this discussion unduly and since the basic composition of the leases are similar, the comments herein have been confined to the type of lease generally used in Mississippi. This would probably be Producers 88 — D9803 (Revised Oct. 1, 1948) with Pooling Provision.

HISTORICAL

It may aptly be said that the oil and gas lease is a foundling of the law, for nowhere in the common law or in the civil law can one find a progenitor for the oil and gas lease. The oil and gas lease from its earliest infancy was nurtured by and grew into full maturity through the jurisprudence of the oil producing states of this nation. It was unknown to the common law and to the civil law until the advent of the Drake Discovery at Titusville, Pennsylvania, in 1859.[1]

Because of the great risk and expense involved, the landowner and

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[1]Colonel Edwin Laurentine Drake was the first operator successfully to drill a commercial oil well. See Merrill, The Evolution of Oil & Gas Law, 13 Miss. L. J. 281. (1941).

the operator "got together," as it were, on an arrangement which was then known as an oil and gas lease contract wherein the operator agreed to bear the entire risk and expense of the venture, the landowner agreed to submit his land to the venture and, if the venture proved to be a success, then the operator further agreed to share the oil production from the land with the landowner. At first, the contract was a simple arrangement but as problems of operation became more and more difficult the oil and gas lease became more and more complex and then as the interests of the landowner and the operator began to clash the courts were called upon to interpret these contracts. Out of this litigation has grown the oil and gas lease as we know it today.[2]

During this evolutionary stage of the oil and gas lease, oil and gas were likened to subterranean or percolating waters[3] and then to wild animals under the rule of "ferae naturae"[4] and production was encouraged by the courts even to the extent of allowing one landowner to drain the oil or gas from under the land of the adjoining landowner with impunity, under the so-called "Rule of Capture."[5] Though these analogies are outmoded today, nevertheless, they did profoundly affect the development of the oil and gas lease, and the applications thereof have caused the courts to arrive at two distinct conclusions as to the nature of the interest in the oil and gas under a mineral lease; namely, "The Title to the Oil and Gas in Place" theory and "The Exclusive Right to Drill and Possess" theory. The former is that the possessor of the interest owns the oil and gas in place while the latter is that the possessor of the interest has the exclusive right to drill for oil and gas and to reduce them to possession as his own.[6]

Among the jurisdictions that have adopted "The Title to the Oil and Gas In Place" theory are Mississippi[7] and Texas[8] and among the jurisdictions that have adopted "The Exclusive Right to Drill and Possess"

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[2]Kulp, Oil and Gas Rights, Sec. 10.1 (1954).

[3]People's Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892).

[4]State v. Ohio Oil Co., 49 N.E. 809, 47 L.R.A. 627 (Ind. 1898).

[5]Kelly v. Ohio Oil Co., 49 N.E. 399, 39 L.R.A. 765 (Ohio 1897); See Hardwicke, The Rule of Capture and Its Implications as Applied to Oil and Gas, 13 Texas L. Rev. 391 (1935); In Griffith v. Gulf Refining Co., 215 Miss. 15, 61 So.2d 306 (1952), the Supreme Court of Mississippi held that the Conservation Law of Mississippi has the effect of discarding the rule of capture.

[6]Kulp, Oil and Gas Rights, Sec. 10.5 (1954). In 1900 a third theory came into being through the decision in Ohio Oil Co. v. Indiana, 177 U.S. 190, 44 L.Ed. 729, known as "the correlative rights" theory. Overlooked for years, this theory seems to have been the impetus or basis for the recent enactment of the conservation acts in the producing jurisdictions of the United States.

[7]Stokely v. State ex rel. Knox, 149 Miss. 435, 115 So. 563 (1928); Pace v. State ex rel. Rice, 191 Miss. 780, 4 So.2d 270 (1941); Lloyd's Estate v. Mullen Tractor and Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941). The other jurisdictions which have adopted "The Title to Oil and Gas in Place" theory are Arkansas, Kansas, Michigan, Montana, New Mexico, Ohio, Pennsylvania, Tennessee and West Virginia. See also 13 Miss. L.J. 358 (1942) and 19 Miss. L.J. 292 (1948).

[8]Lockhart v. Williams, 192 S.W. 2d 146 (Tex. 1946).

theory are Louisiana[9] and Oklahoma.[10] Through the adoption of the former theory, Mississippi and Texas have established two estates in land; namely, the surface estate and the mineral estate, which estates can be owned separately and distinctly from each other and by different owners.[11] Under the latter theory, Louisiana has established all transactions in oil and gas as conveyances of mineral servitudes with no vested estate in the minerals or in the land.[12]

It is worthy of note that all of the jurisdictions, whether they adhere to the first theory or to the second, have consistently held that the oil and gas lease is a real property right.[13] Accordingly, oil and gas leases are generally subject to the same principles and rules of law as are conveyances and transfers of title to real property, such as the statutes of frauds,[14] homesteads, delivery, acknowledgments, recording, taxation, etc.[15] However, it is also to be noted that where an ordinary land deed is ambiguous or its meaning doubtful the usual rule followed by the courts is to construe it most strongly against the grantor and in favor of the grantee,[16] while in the case of ambiguity or doubtful meaning in an oil and gas lease the usual rule followed by the courts is to construe it most strongly against the lessee and in favor of the lessor.[17] But the Supreme Court of Mississippi in *Love Petroleum Co. v. Atlantic Oil Producing Co.*,[18] held that the mineral lease "must be construed most favorably to the lessee." There have been varying degrees of severity[19] in this

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[9]Frost-Johnson Lbr. Co. v. Salling's Heirs, 91 So. 207 (La. 1922).

[10]Rich v. Doneghey, 177 Pac. 86, 3 A.L.R. 352 (Okla. 1918). The other jurisdictions which have adopted "The Exclusive Right to Drill and Possess" theory are California, Illinois, Indiana, Kentucky and New York.

[11]Gulf Refining Company v. Stanford, 202 Miss. 602, 30 So.2d 516 (1947); Pace v. State ex rel. Rice, 191 Miss. 780, 4 So.2d 270 (1941); Whelan v. Johnston, 192 Miss. 673, 6 So.2d 300 (1942); Stern v. Great Southern Land Co., 148 Miss. 649, 114 So. 739 (1927); Talley v. Howsley, 176 S.W.2d 158 (Tex. 1944).

[12]George v. Manhattan Land & Fruit Co., 51 F.2d 28 (5th Cir. 1931).

[13]Merrill Engineering Co. v. Capitol National Bank of Jackson, 192 Miss. 378, 5 So.2d 666 (1942). See Act No. 6 of Second Extraordinary Session of 1950, Louisiana Legislature.

[14]Acadian Production Corp. of Louisiana v. Tennant, 63 So.2d 343 (La. 1953); Sunburst Oil & Gas Co. v. Nevillle, 257 Pac. 1016 (Mont. 1927); Woodworth v. Franklin, 204 Pac. 452, 27 A.L.R. 590 (Okla. 1921); Lockhart v. Williams, 192 S.W.2d 146 (Tex. 1946). See Miss. Code Ann. § 264 (1942).

[15]See Miss. Code Ann. §§ 330, 332 (1942); Hughes v. Franklin, 201 Miss. 215, 29 So.2d 79 (1947); Roach v. Junction Oil & Gas Co., 179 Pac. 934 (Okla. 1919); Stephenson v. Mallett, 240 S.W. 633 (Tex. 1922). See also Miss. Code Ann. §§ 9701-07, 9770 (1942); Bailey v. Federal Land Bank of New Orleans, 206 Miss. 354, 40 So.2d 173 (1949); Pettis v. Brown, 203 Miss. 292, 33 So.2d 809 (1948).

[16]Dickson v. Van Hoose, 47 So. 718 (Ala. 1908); Couch v. Southern Methodist University, 10 S.W.2d 973 (Tex. 1928).

[17]Rives v. Gulf Refining Co., 62 So. 623 (La. 1913); Young v. Jones, 222 S.W. 691 (Tex. 1920).

[18]169 Miss. 259, 152 So. 829 (1934).

[19]See Jones v. Southern Natural Gas Co., 36 So.2d 34 (La. 1948) where the court held the ambiguity to be a mutual mistake and that the lessor was estopped from demanding a forfeiture of the lease. To the same effect is Colby v. Sun Oil Co., 288 S.W.2d 221 (Tex. 1956). See also Scruggs v. Clark, 213 Miss. 290, 56 So.2d 805 (1952).

rule over the years. Yet, it is basically the law today, the reason being that the lessee usually prepares the oil and gas lease contract or has his attorney prepare same.

The interest of the lessor under a mineral lease in Mississippi has been held to consist of a reversionary fee interest in the oil, gas and other minerals, if and when the lease is cancelled or forfeited, while the interest of the lessee has been held to consist of a determinable fee interest in the minerals.[20] Of considerable importance to the title examiner in Mississippi should be the holding of our Supreme Court that adverse possession of the surface of the land will not operate as adverse possession of the severed mineral estate and that adverse possession of the severed minerals can be accomplished only by actual drilling therefor,[21] unless the mineral estate is coupled with some interest in the surface.

THE PARTIES

Generally, oil and gas leases should be executed by all those who own mineral interests in the land to be leased.[22] Those who do not participate in the income from the lease until there is production, such as owners of royalty interests, are not necessary parties to the oil and gas lease, unless, in some instances, they be required for pooling.[23] Not only must there be capacity in the lessor to execute an oil and gas lease but also must there be capacity in the lessee to acquire the lease.[24] However, the fact that the lessee may be under some disability such as infancy or insanity will not preclude him from taking title to the lease.[25]

The relationship between the lessor and the lessee in an oil and gas lease is neither one of trust,[26] nor one of joint adventure,[27] nor one of landlord and tenant,[28] nor one of cotenancy, but rather the relationship is one of vendor and vendee.[29] Consequently, the rules of law governing vendor and the vendee relationship are more applicable to the oil and gas lease than the rules governing any of these other relationships.

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[20]Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946).

[21]Levy v. Campbell, 200 Miss. 720, 28 So.2d 224 (1946); Cook v. Farley, 195 Miss. 638, 15 So.2d 352, (1943).

[22]See 1A Summers, The Law of Oil & Gas, § 131 and Vol. 2, §§ 211 to 225. See also Schlittler v. Smith, 101 S.W.2d 543 (Tex. 1937); Marrs v. Railroad Commission, 177 S.W.2d 941 (Tex. 1944).

[23]See Hoffman, Voluntary Pooling and Unitization, pp. 190-92 (1954).

[24]See 16 Am. Jur., Deeds §§ 87-88.

[25]See 27 Am. Jur., Infants § 6; 28 Am. Jur., Insane and Other Incompetent Persons § 61.

[26]Kirke v. Texas Co., 186 F.2d 643 (7th Cir. 1951); Carter Oil Co. v. Crude Oil Co., 201 F.2d 547 (10th Cir. 1953).

[27]Cooper v. Ohio Oil Co., 25 F. Supp. 304 (D. Wyo. 1938).

[28]Alphin v. Gulf Refining Co., 39 F. Supp. 570 (W.D. Ark. 1941); Parker v. Standard Oil Company of Kansas, 250 S.W 2d 671 (Tex. 1952). Rives et al. v. Gulf Refining Co., 62 So. 623 (La. 1913).

[29]Staplin v. Vesely, 72 P.2d 7 (N.M. 1937).

Executions of oil and gas leases by minors or insane persons are void or voidable[30] depending upon the statutes of the state where the land embraced within the lease is located.[31] Today practically every oil producing state in the Union has enacted statutes whereby the minor's or lunatic's interest in the oil and gas may be leased through a guardian properly appointed and empowered pursuant to the statute.[32] As a general rule, the lease can be avoided in the case of an insane person within a certain time after his sanity is restored and in the case of an infant upon his reaching majority.[33]

Every practitioner from time to time is confronted with perplexing problems involving the execution of an oil and gas lease by a married person. Eliminating the troublesome matters of dower rights and curtesy rights,[34] and if the land is no part of the homestead, the law is well settled that the husband as owner of the land can grant a valid oil and gas lease thereon without the signature of his wife and, similarly, in the majority of jurisdictions, the wife as owner of the land may execute a valid oil and gas lease without the joinder of the husband.[35] In Louisiana and Texas where the community property law prevails, the situation is quite different. In Louisiana if the land sought to be leased is not homestead but community property, and in the name of the husband, then the signature of the husband as "head and master of the community" is all that is necessary for a valid execution of the lease.[36] If the land is no part of the homestead, but community property and in the name of the wife, then both husband and wife must sign the lease.[37] If the land is owned as separate property but held jointly by husband and wife then the signature of both to the oil and gas lease is necessary for validity. In Texas the husband can give a valid lease on all community property, save the homestead, without the joinder of the wife.[38]

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[30]See 9 Miss. L. J. 217, 484 for Mississippi Law as to infant's contracts. Also see Woolbert v. Lee Lbr. Co., 151 Miss. 56, 117 So. 354 (1928) as to insane persons contracts. However, validity of a mineral lease executed by lessor 4 months prior to adjudication of insanity was upheld in Schmidt v. Humble Oil & Refining Co., 219 F.2d 551 (5th Cir. 1955).

[31]For example see Calcote v. Texas Pacific Coal & Oil Co., 157 F.2d 216, 167 A.L.R. 413 (5th Cir. 1946).

[32]Miss. Code Ann. § 415 (1942). Some of the other states that have enacted comparable statutes are Arkansas, Illinois, Kentucky, Nebraska, Oklahoma, and Texas.

[33]See Miss. Code Ann. §§ 738, 1388 (1942). Though some of the members of the Mississippi Bar are of the opinion that under § 415 of the Miss. Code the guardian can validly be empowered to grant a mineral lease on his minor ward's interest that would extend beyond the minor's majority, nevertheless, the writer expresses grave doubt that the ward's interest could be so controlled after his majority and against his will.

[34]Mississippi has abolished dower and curtesy. See Miss. Code Ann. § 453 (1942).

[35]See discussions on dower in 18 A.L.R. 2d 137 to 149 (1951); however, in Texas (13 Tex. Civ. Stat., Vernon, 1940, Art. 4614) the husband's signature is necessary for a valid lease.

[36]LeRosen v. North Central Texas Oil Co., 126 So. 442 (La. 1930).

[37]Angichiodo v. Cerami, 28 F. Supp. 720 (D. La. 1939).

[38]13 Tex. Civ. Stat., Vernon 1940, Art. 4619.

Though homesteads did not exist in the old common law, nevertheless, the majority of the common law states today recognize homesteads as a result of statutory or constitutional provisions. The requirements for the establishment of a homestead vary in the different states, but the homestead rights in the land may vest in either spouse regardless of which spouse holds title thereto.[39] Ordinarily, in the matter of homesteads, both the husband and wife must execute the oil and gas lease whether in a state that adheres to the "title to oil and gas in place" theory or in a state that adheres to the "exclusive right to drill and possess" theory.[40] Neither spouse is estopped from asserting the invalidity of the oil and gas lease on the homestead property executed by the other spouse alone, even though consideration for the oil and gas lease is being retained by the other spouse.[41] This is so, regardless of the provision in paragraph 12 of Producers 88, that the lessor surrenders and releases all rights of homestead insofar as same may affect the lease, and, in light of the basic homestead law in Mississippi, it would appear that this provision is meaningless. Some jurisdictions require, in addition to both spouses' signing the same oil and gas lease covering the homestead property, that the lease be contemporaneously signed by them. The writer considers Mississippi to be in this category. It can also be said that any renewal or extension or alteration of the oil and gas lease by a spouse without the consent of the other would be invalid.[42] Where the oil and gas lease on homestead property is not signed by both husband and wife, a change in the homestead status thereafter will not validate the lease.[43]

An always interesting situation prevails when either a life tenant or a remainderman, or both, execute an oil and gas lease, or as in Louisiana, when the usufructuary or naked owner, or both, execute an oil and gas lease. The general rule is that since the life tenant is only entitled to the use of the property and income, which would include royalty from wells producing when the life tenancy began, he cannot drill new wells, nor can he validly lease the land for oil and gas without the consent of the re-

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39Miss. Code Ann. §§ 330, 332. See also annot. 45 A.L.R. 395 (1926).

40See detailed discussion of leases of homesteads, 13 Miss. L. J. 462 (1941) and Miss. Code Ann. §§ 330, 332; Bailey v. Texas Pacific Coal & Oil Co., 32 Pac. 2d 709 (Okla. 1934); Green v. West Texas Coal Mining & Developing Co., 225 S.W. 548 (Tex. 1920); Gillespie v. Fulton, 86 N.E. 219 (Ill. 1908). Note exceptions in Schmidt v. Humble Oil & Refining Co., 219 F.2d 551 (5th Cir. 1955); Minor v. Interstate Gravel Co., 130 Miss. 553, 94 So. 3 (1922); and Smith v. Smith, 193 Miss. 201, 8 So.2d 879 (1947).

41Peterson v. Skidmore, 195 Pac. 600, (Kans. 1921); Young v. Ashley, 123 Miss. 693, 86 So. 458 (1920).

42See Evans v. Mills, 67 F.2d 840 (5th Cir. 1934).

43See Cummings v. Busby, 62 Miss. 195 (1884) where the instrument was held to be void "ab initio," and Bruce v. Spears, 181 Miss. 786, 187 So. 756 (1938); but Texas has held in Fisher v. Gulf Production Co., 231 S.W. 450 (1921) that when the homestead property ceases to be homestead the lease becomes valid. See also 45 A.L.R., 395 (1926).

mainderman.[44] Should the life tenant drill and produce oil or gas without the remainderman's consent, he is not entitled to retain any of the proceeds or the income therefrom, unless he acted in good faith, believing that he was the fee owner of the land, then in most of the common law jurisdictions he is allowed to deduct the cost of production from the value of the oil or gas produced.[45] The remainderman, likewise, cannot validly give an oil or gas lease or drill on the land, without the consent of the life tenant.[46] Should the remainderman attempt to drill or his lessee attempt to drill, the life tenant can enjoin the remainderman or his lessee, since the life tenant is entitled to exclusive possession of the land.[47] However, should the remainderman drill and produce oil or gas, without the consent of the life tenant, then the life tenant is entitled to an accounting thereof.[48] But, the all important question here is the basis upon which the accounting is to be had. There seem to be as many answers to this as there are oil producing jurisdictions.

Another grave question in the matter of the remainderman and the life tenant is whether the remainderman has any way of protecting himself when the life tenant refuses to permit development and drainage is taking place by production on adjoining land. The writer has been unable to find a decision that would adequately answer this question. It would appear to the writer, in a situation of this nature, where the law affords no remedy, equity should step in and give the necessary relief.[49] The writer dares say the Courts of Mississippi would do just that.

However, there appears to be a decided exception to the general rule that the life tenant is not entitled to income from new production where a testator or former owner of the land after granting an oil and gas lease or making a contract to drill a well on the land then creates the life tenancy either by devise or conveyance. It has been held in these cases that, in the absence of a provision to the contrary in the will or conveyance, the life tenant would be entitled during the life tenancy to the rentals and royalties under oil and gas lease executed by the testator or former owner of the land.[50]

44See Pace v. State ex rel Rice, 191 Miss. 780, 4 So.2d 270 (1941). See also 43 A.L.R. 811 (1926).

45See 38 A.L.R. 694 (1897).

46Carter Oil Co. v. McQuigg, 112 F.2d 275 (8th Cir. 1940).

47See discussion in 4 Thompson, Real Property § 2203, p. 736 (2d ed. 1939).

48In Welborn v. Tidewater Assoc. Oil Co., 217 F.2d 509 (10th Cir. 1954) the court held: "It is well settled that a remainderman may not make an oil and gas lease to permit immediate exploration and production without the consent of the life tenant. Likewise, a life tenant cannot drill new oil or gas wells, or lease the land to others for that purpose. A life tenant and the remainderman may lease the land by a joint lease and they may agree as to the division of the rents and royalties. In the absence of such agreement, the life tenant is not entitled to any part of the royalties, but is entitled only to the income from such royalties."

49See 3 Summers, The Law of Oil and Gas, § 613.

50Baze v. Scott, 24 F. Supp. 806 (E.D. Okla. 1938); Benson v. Nyman 16 P.2d 963 (Kans. 1932); see also Eager's Guardian v. Pollard, 239 S.W. 39 (Ky. 1922).

Where the remainderman and the life tenant join in an oil and gas lease on the land, the lessee acquires all of the necessary rights to enter and produce oil and gas from said land. If there is no contra agreement between the life tenant and the remainderman, the life tenant is entitled to the income from the rentals and royalties during life tenancy.[51] This seems to be the universal rule.

The rule with reference to cotenants, or co-owners in Louisiana, is very different from the rule with reference to the remainderman and the life tenant, for it has universally been held that one cotenant owes to the other cotenant the duty to cooperate in saving their property from loss or injury.[52] Each cotenant has the right to occupy wholly the oil and gas property,[53] and, in order to prevent loss, one cotenant has the right to utilize the minerals without the consent or concurrence of the other cotenant.[54] As a consequence, the taking of oil or gas from the land by one cotenant should not constitute waste and, as such, the non-consenting cotenant should not be allowed to prevent the other cotenant from drilling or leasing the land for oil and gas.[55] When one cotenant or his lessee drills, without the joinder of the other cotenant, said co-tenant or his lessee assumes all the risk of loss from non-production;[56] but, if he is successful in obtaining production, then the non-consenting cotenant may recover his proportionate part of the production, less his proportionate part of the cost of production.[57] Most courts follow this rule and the writer is of the belief that, when such situation is presented to the Courts of Mississippi for a decision, they will hold accordingly.[58] Of course, all of the cotenants can consent to the oil and gas lease on

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[51]Burden v. Gypsy Oil Co., 40 P.2d 463 (Kans. 1935); Barnes v. Kerp, 127 Pac. 261 (Okla. 1912); see discussion in Whitaker v. Surtees, 248 S.W. 432 (Tex. 1923).

[52]Guffey v. Stroud, 16 S.W.2d 527, 64 A.L.R. 730 (Tex. 1929); see also Pinchback v. Gulf Oil Corp., 242 S.W.2d 242 (Tex. 1951).

[53]Willson v. Superior Oil Co., 274 S.W.2d 947 (Tex. 1954), held that the interest of each cotenant is coextensive of the property and extends to every part thereof, and, while each cotenant has the right to occupy the property, neither of them has the right to occupy any particular part of it to the exclusion of the other, and that a lessee of a cotenant becomes a cotenant with the cotenant of his lessor.

[54]Guffey v. Stroud, 16 S.W.2d 527, 64 A.L.R. 730 (Tex. 1929); Burnham v. Hardy Oil Co., 147 S.W. 330 (Tex. 1912). See Miss. Code Ann. § 1324.5 (1942).

[55]See for thorough discussion of good faith and bad faith drilling Walker, Fee Simple Ownership of Oil and Gas in Texas, 6 Texas L. Rev. 125 (1928); Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (10th Cir. 1924). Though the majority rule is that such action does not constitute waste and the non-consenting cotenant cannot prevent the other cotenant from taking such action, nevertheless, the minority rule prevalent in Louisiana and West Virginia is otherwise. See Amerada Petroleum Corp. v. Reese, 196 So. 558 (La. 1940); Smith v. United Fuel Gas Co., 166 S.E. 533 (W. Va. 1932) and Zeigler v. Brenneman, 86 N.E. 597 (Ill. 1908).

[56]Estes v. Texas Consolidated Oils, 266 S.W.2d 272 (Tex. 1954); McCord v. Oakland Quicksilver Mining Co., 27 Pac. 863 (Cal. 1883).

[57]See Carter Oil Co. v. Crude Oil Co., 201 F.2d 547 (10th Cir. 1953); Marias River Syndicate v. Big West Oil Co., 38 P.2d 599 (Mont. 1934); Thompson v. Johnson-Kemnitz Drilling Co., 145 P.2d 422 (Okla. 1943).

[58]See Medford v. Frazier, 58 Miss. 241 (1880).

the common property or execute a joint lease thereon and thereby receive their proportionate part of the bonus, rentals, and royalties.[59] This same result can be accomplished through the execution of separate leases by all the cotenants.[60]

Now, speaking generally about executors, administrators, trustees, and attorneys-in-fact as lessors, we can safely state that these parties cannot execute a valid oil and gas lease, unless specifically authorized by some statute; or unless in the case of the executor, he is given that power in the will; or in the case of the administrator, the court authorizes the sale in order to pay debts of the estate; or in the case of the trustee or the attorney-in-fact, the trust or power of attorney expressly grants the power to execute an oil and gas lease.[61] The writer is of the opinion this would be the rule in Mississippi.[62] If the trust or power of attorney is of shorter duration than the lease, then it is very doubtful that a trustee can validly execute an oil and gas lease to extend beyond the duration of the trust, without the aid of a statute; it is, likewise, questionable whether a trustee can validly execute an oil and gas lease to extend beyond the life of the beneficiary.[63]

There appears to be very little jurisprudence as to whether a surviving partner can validly execute an oil and gas lease covering the partnership lands. Nevertheless, in the Texas case of *Martin v. Dial*,[64] the court held that a surviving partner may sell lands of the partnership for the payment of partnership debts and that therefore he should have the power to make an oil and gas lease on the lands for that purpose.

The capacity of a corporation, whether it be a railroad or any other type, to grant valid oil and gas leases on its land always depends upon the constitution or statute of the state, wherein the land is located and, if these be favorable, then upon the act of incorporation. In *Whelan v. Johnston*,[65] the Supreme Court of Mississippi held that since the act chartering the railroad company created in it a fee simple title to the land used for its roadbed, which included the oil and gas, the railroad company could execute a valid oil and gas lease on its right of way.

Another type of party to an oil and gas lease is the government, federal and state, and this type is truly a law unto itself, for the procedure

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[59]Little v. Mountain View Dairies, Inc., 217 P.2d 416 (Cal. 1950).

[60]See Miles v. Frank, 119 Miss. 147, 80 So. 532 (1919).

[61]See Irons v. Fort Worth Sand & Gravel Co., 260 S.W.2d 629 (Tex. 1953); Oliver v. Culpepper, 190 S.W.2d 457 (Ark. 1945); Tide Water Associated Oil Co. v. Curten, 107 P.2d 945 (Cal. 1941); Ilari v. Ewing, 234 S.W.2d 293 (Ky. 1950).

[62]See Stokes v. Payne, Kennedy & Co., 58 Miss. 614 (1881); Columbus Insurance & Baking Co. v. Humphries, 64 Miss. 258, 1 So. 232 (1886); Pike County v. Bilbo, 198 Miss. 775, 23 So.2d 530 (1945); Thornhill v. Ford, 213 Miss. 49, 56 So.2d 23 (1951).

[63]See Humble Oil & Refining Co. v. State, 206 Miss. 847, 41 So.2d 26 (1949); but compare Franklin v. Margay Oil Corporation 153 P.2d 486 (Okla. 1944).

[64]57 S.W.2d 75 (1933).

[65]192 Miss. 673, 6 So.2d 300 (1942).

of procuring oil and gas leases on public lands is controlled entirely by statutes and these statutes must be strictly complied with in order to obtain a valid lease. Because of the numerous classifications of public lands in the United States Department of the Interior and because of the numerous rules and regulations applicable thereto, the practitioner would be wise to consult Hoffman, Oil and Gas Leasing on the Public Domain,[66] when dealing with the procurement of an oil and gas lease from the United States Government. Though the classifications of public lands in Mississippi are not so numerous and not so complicated as are those of the federal government, nonetheless, a perusal of *Dantzler Lumber Co. v. State*,[67] *Pace et al v. State ex rel. Rice*,[68] *Humble Oil & Refining Co. v. State*,[69] *Oliver v. Board of Supervisors*,[70] *Thornhill v. Ford*[71] will indicate the strictness with which the courts in this state look upon this type of lease.

Generally the oil and gas leasing of public lands in Mississippi is vested in the State Mineral Lease Commission;[72] however, there are other agencies of the state government, such as, the Board of Trustees of State Institutions of Higher Learning, Boards of Supervisors, etc., which are empowered to grant oil and gas leases on certain types of public lands in Mississippi.[73]

In considering the parties to an oil and gas lease and the difficulties encountered in connection therewith, the writer recalls a rather provoking situation that arose in an old Texas case[74] when the court refused to give effect to an oil and gas lease, signed and delivered by three of the lessors named therein, because the other lessors named in the lease would not sign same. As a precaution against any misunderstanding of this nature, it is always advisable to insert a counterpart clause in the lease.[75]

THE CONSIDERATION

At first blush, it would appear that the sole consideration for an oil and gas lease is the bonus given for the procurement of the lease. In the usual sense, "bonus" means the cash consideration or down payment,

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66Lewis Edwin Hoffman, Chief, Branch of Minerals Division of Adjudication, Bureau of Land Management, Washington 25, D. C.

67 97 Miss. 355, 53 So. 1 (1910).

68 191 Miss. 780, 4 So.2d 270 (1941).

69 206 Miss. 847, 41 So.2d 26 (1949).

70 211 Miss. 447, 51 So.2d 766 (1951).

71 213 Miss. 49, 56 So.2d 23 (1952).

72See Miss. Code Ann. § 5948 (1942).

73E.g., see Miss. Code Ann. § 6600 (1942). See detailed discussion of this by Wade, Recent Mississippi Oil and Gas Cases, in 18 Miss. L.J. 252 (1947).

74Watson v. Cloud, 225 S.W. 807 (1920).

75A representative counterpart clause is to be found in Gulf Form 3238-D as follows: "This lease shall be binding upon each party who executes it regardless of whether or not any of the other parties named above execute the same and the term 'Lessor' as used herein shall apply (collectively) only to those who do execute the same."

paid or agreed to be paid, for the execution of the lease.[76] This is, strictly speaking, only a part of the consideration. The true consideration given for an oil and gas lease includes the initial purchase money, the agreement to pay an annual rental to keep the lease effective and, in case of production, a portion of the production in the form of royalty, which production and development are usually deemed to be the greatest part of the consideration.[77] In the recent case of *Millette v. Phillips Petroleum Company*[78] the Supreme Court of Mississippi held that development constituted the main consideration of the oil and gas lease.

In addition to this, it can properly be said that the consideration also extends to the risk that the lessee takes and the cost of drilling and operating that the lessee assumes in his effort to produce oil or gas from the leased premises. It has also been held that the consideration moving to the lessor is an interest in the oil and gas.[79]

Several courts have held that a valid oil and gas lease requires a consideration[80] and that $1.00 consideration is sufficient for a valid lease,[81] and some courts have even gone so far as to hold that a recited consideration of $1.00 or other nominal consideration is sufficient even if not paid.[82] Other courts have held that mutual promises or mutuality of obligation will bind both parties and support the validity of the lease.[83] The lessee's promise to develop the premises,[84] or to prevent loss to the lessor[85] has been held sufficient in itself to support the validity of the lease. Of course, all of this is based upon the fact that the lessor, in the case of production will receive a royalty or a share of the production as further consideration for the execution of the oil and gas lease.

Mere inadequacy of consideration in the oil and gas lease is not sufficient to justify cancellation unless combined with fraud.[86]

The concensus in Mississippi seems to be that an oil and gas lease without a cash consideration is good as between the parties or their heirs in the absence of fraud, mistake or undue influence, particularly since the lessor is entitled to rentals and royalties.[87] However, in Producers 88, the most consistently used form in Mississippi, paragraph 5 contains the

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[76]Carroll v. Bowen, 68 P.2d 773 (Okla. 1937).

[77]Carter v. Arkansas-Louisiana Gas Co., 36 So.2d 26 (La. 1948); Sheppard v. Stanolind Oil & Gas Co., 125 S.W.2d 643 (Tex. 1939).

[78]209 Miss. 687, 48 So.2d 344 (1950).

[79]Canadian River Gas Co. v. Bivins, 153 S.W.2d 432 (Tex. 1941).

[80]Magnolia Petroleum Co. v. Connellee, 11 S.W.2d 158 (Tex. 1928).

[81]Chism. v. Hollis, 152 Miss. 772, 118 So. 713 (1928).

[82]Heard v. Pratt, 257 S.W. 660 (Tex. 1924).

[83]McCaskey v. McCall, 226 S.W. 432 (Tex. 1920). Note implication in Delange v. Ogden, 106 S.W.2d 385 (Tex. 1937).

[84]McCaskey v. McCall, 226 S.W. 432 (Tex. 1920). See also discussion in Colquitt v. Eureka Producing Co., 63 S.W.2d 1018 (Tex. 1933).

[85]Jones v. Bevier, 59 S.W.2d 945 (Tex. 1933).

[86]Harrell v. Imperial Oil & Gas Products Co., 132 So. 413 (La. 1931); McCaskey v. Schrock 225 S.W. 418 (Tex. 1920).

[87]Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So.2d 344 (1950).

poignant recital: "The down cash payment is consideration for this lease according to its terms and shall not be allocated as mere rental for a period."

THE GRANTING CLAUSE

There appear to be three forms of combinations of granting clauses commonly used in modern oil and gas leases. The first type grants, demises, leases and lets the land for the sole purpose of conducting operations thereon for the production of oil and gas; the second type grants the exclusive right to drill and produce oil and gas from the land and reduce them to possession; the third type grants, bargains, sells and conveys all the oil and gas in the land with the right to ingress and egress for the purpose of conducting drilling operations thereon for oil or gas.[88] Since it is indispensable to drilling and producing operations that the lessee have the right of ingress and egress to the leased premises for that purpose, the lease often expressly grants this right. However, it has universally been held that without such specific grant, the right of ingress and egress will be implied so far as is necessary for the full enjoyment of the grant.[89] The difficulty in the matter of granting clauses in a mineral lease seems to be the designation of the nature of the lessee's interest and, in some jurisdictions, the lessee's interest is made to depend upon the kind of granting clause used in the lease. As a consequence, the lessee's interest has been held to be a "mere license," "an interest in land," "a right to explore," "an estate in land," etc.[90]

Under the first and third types of granting clauses the lessee possesses a corporeal hereditament and title to the oil and gas in place, while under type two the lessee possesses only an incorporeal real right in the form of a license to drill. It would appear that Texas could be classed as both type one and type three,[91] while Louisiana could be classed as type two.[92] Though it would appear that two forms of granting clauses in oil and gas leases are used in Mississippi,[93] nevertheless, the most popular one seems to be the clause that grants, leases and lets exclusively unto lessee for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas and all other minerals, laying pipe

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88See Kulp, Oil & Gas Rights, § 10.26 (1954).

89McNesse v. Renner, 197 Miss. 203, 21 So.2d 7 (1945); Dabney-Johnston Oil Corp. v. Walden, 52 P.2d 237 (Cal. 1935); Buck Creek RR. v. Haws, 69 S.W.2d 333 (Ky. 1934); Palmer Corp. of Louisiana v. Moore, 132 So. 229 (La. 1931). Westbrook v. Ball 77 So.2d 274 (Miss. 1955).

90Hutchinson v. McCue, 101 Fed. 2d 111 (4th Cir. 1939); Franklin v. Margay Oil Corp., 153 P.2d 486 (Okla. 1944); Lindlay v. Raydure, 239 Fed. 928 (E.D. Ky. 1917); Carroll v. McCarthy, 129 S.W.2d 1201 (Tex. 1939).

91Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923); Curry v. Texas Co., 18 S.W.2d 256 (Tex. 1929).

92Frost-Johnson Lbr. Co. v. Sallings Heirs, 91 So. 207 (La. 1922).

93See Hall, The Application of the Determinable Fee Theory in Construing the Mississippi Mineral Lease, 19 Miss. L.J. 297 (1948).

lines, building roads, tanks, power stations, telephone lines and other structures thereon to produce, save, take care of, treat, transport and own said products, and housing its employees.[94] The other grants the lessee the exclusive right to explore the land for mineral indications, to drill and mine thereon for oil, gas, sulphur and other minerals, to produce and appropriate any or all of same therefrom, etc.[95] The word "exclusive" appears in both forms and grants exclusive right in the strictest sense of the word. However, the lessee is vested with this right exclusively whether or not the word "exclusive" is used in the granting clause.[96]

Regardless of the type of the granting clause in the mineral lease, the writer is of the opinion that Mississippi would hold any oil and gas lease to be a present conveyance of a corporeal estate in oil and gas in place, amounting to a determinable fee.[97]

In connection with the granting clause, the question often arises as to what the lessor should make available to the lessee as necessary to the enjoyment of the rights granted in the oil and gas lease. Under the oil and gas lease the lessee has not only the right to use so much of the surface as may be reasonably necessary for his operations[98] but also the right upon getting production actually to remove a part of the substance of the soil.[99] This includes the right to remove trees if necessary.[100] As extensions to the rights expressed in the granting clause, the lessee may also make geophysical explorations by seismographic tests and build pits for salt water, waste oil, basic segment or any other refuse matter thereon, whether the lease provides for same or not.[101] Of course, if too much land is used the lessee is liable for the reasonable value of the use of the excess land.[102] And if lessee permits refuse matter to escape and flow over the surface of other parts of the land, he is liable for the damages resulting therefrom.[103] Generally the courts deem the lessee's right to the surface superior to the right retained by the lessor, insofar as is necessary to the full enjoyment of the grant, but with due regard to the rights of

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[94]See Producers 88-D9803, (revised Oct. 1, 1948) with pooling provision.

[95]See Gulf form 3238-D.

[96]See 3 Summers, The Law of Oil and Gas, § 532, pp. 224-226.

[97]Stokely v. State ex rel., Knox, 149 Miss. 435, 115 So. 563 (1928); Dougherty v. Greene, 218 Miss. 250, 67 So.2d 297 (1953).

[98]Gulf Refining Co. v. Davis, 80 So.2d 467 (Miss. 1955); Placid Oil Co. v. Lee, 243 S.W.2d 860 (Tex. 1951).

[99]Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946); Commr of Int. Rev. v. Wilson, 76 F.2d 766 (7th Cir. 1935).

[100]LeCroy v. Barney, 12 F.2d 363 (8th Cir. 1926).

[101]Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950); Indian Territory Illuminating Oil Co. v. Dunivant, 80 P.2d 225 (Okla. 1938).

[102]Magnolia Petroleum Co. v. Norvell, 240 P.2d 80 (Okla. 1952); Gulf Refining Co. v. Davis, 80 So.2d 467 (Miss. 1955).

[103]Indian Territory Illuminating Oil Co. v. Dunivant, 80 P.2d 225 (Okla. 1938).

the lessor in the surface.[104]

The lessor, at his risk and expense, has the privilege of using surplus gas from any gas well on his land for stoves and inside lights in the principal dwelling thereon.[105] As a general rule the lessee is entitled to the free use of oil, gas and water on the premises to operate and produce the lease but the amount is limited to what is reasonably necessary for that purpose.[106] The rule may be stated simply, but, the application of the rule often becomes very complex and difficult.[107]

THE DESCRIPTION

The matter of descriptions of lands in oil and gas leases presents no peculiar problems, for the same rules of law that govern the descriptions of lands in conveyances will govern the descriptions of lands in an oil and gas lease.[108] However, an interesting question always arises as to what lands are covered by an oil and gas lease which contains a provision: "This lease also covers and includes all land owned or claimed by lessor adjacent or contiguous to the land particularly described above, whether the same be in said section or sections, grant or grants or in adjacent sections or grants."[109] This is the well known "Mother Hubbard Clause" or "Cover-all Clause" as it is called, whose purpose is to aid in the description of the land, particularly in case of faulty legal descriptions or omissions. The answer to this question lacks definiteness in all jurisdictions, save Louisiana,[110] but there are some jurisdictions such as Texas[111] and Mississippi[112] that have indicated through their courts a tendency toward giving effect to the "Mother Hubbard Clause."

104Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950); Joyner v. R. H. Dearing & Sons, 112 S.W.2d 1109 (Tex. 1937).

105See Producers 88, paragraph 3.

106See 4 Summers, The Law of Oil and Gas, §§ 651, 652. Producers 88, Paragraph 3 states that "Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used" and it further provides in paragraph 7 that "Lessee shall be responsible for all damages caused by lessee's operations hereunder other than damages necessarily caused by the exercise of the rights herein granted."

107See McMahon, Rights and Liabilities With Respect to Surface Usage by Mineral Lessees, Sixth Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, p. 231. (1955).

108Cushenberry v. Waite-Phillips Co., 240 Pac. 400 (Kan. 1925). See Silvey v. Upton, 202 Miss. 485, 32 So.2d 267 (1947). For an excellent treatment of Mississippi Land Descriptions, see Ewing, Mississippi Land Descriptions, 18 Miss. L.J. 381 (1947).

109Producers 88 Paragraph 1.

110See United Gas Public Service Co. v. Mitchell, 177 So. 697 (La. 1937) in which Louisiana Supreme Court refused to give effect to cover all clause.

111Dennis v. Pace Petroleum Co., 230 S.W.2d 585 (Tex. 1950); Gardner v. Amerada Petroleum Corp., 91 F. Supp. 134 (S.D. Tex. 1950).

112Cummings v. Midstates Oil Corp., 193 Miss. 675, 9 So.2d 648 (1942). However in Texas Co. v. Newton Naval Stores, 78 So.2d 751 (Miss. 1955) the Mississippi Supreme Court refused to give effect to the cover all clause, but there were, in this case extenuating circumstances, such as reduction of rental payments and a typed-in exception in the description which contradicted the printed cover all clause.

Modern oil and gas leases contain an estimation of the acreage covered by the lease set out therein. The purpose of same is for the calculation of the rental payments under the provisions of the lease. Rarely ever does one find, in checking titles to lands embraced within the lease that the lands when surveyed, conform to the regular quarter-quarter section of 40 acres or to the regular section of 640 acres. Consequently, it would appear that the safest means to a proper payment of rentals is to set out in the lease the exact acreage that the lessor and lessee are willing to agree upon for the payment of rentals and thereby obviate later possible conflict. A very informative Mississippi decision on the matter of excess acreage is to be found in the case of *Oliver v. Board of Supervisors of Adams County*,[113] wherein a survey revealed that the section covered by the mineral lease contained 3 acres more than the 640 estimated acres recited in the lease. The court held that the lease would validly cover said excess acreage upon the lessee's paying to the lessor the original per acre bonus and rental therefor.

Another intriguing problem comes to the fore in the matter of accretions, where the land has been described according to the original government survey and accretion has taken place subsequent to the survey but prior to the obtainment of the oil and gas lease. At least, in one state, Kansas,[114] this problem seems to have been decided in favor of the lessee by holding that his lease covered the accreted acreage, even though the rentals were based on a lesser acreage. In light of the Mississippi doctrine that a riparian land owner is vested with title to the center of the bed of the river or stream bordering his land,[115] the writer is of the opinion that the lessee in a mineral lease covering land in Mississippi adjoining a river or stream would be legally entitled to the accreted acreage whether described or not. This rule has heretofore been established in Mississippi with reference to rights of way for public roads[116] and for railroads.[117]

Though the discrepancy between the actual acreage and the estimated acreage could cause conflict in the matter of payment of royalties, where a lease or a part thereof is placed in a unit with other leases, nevertheless, the writer knows of no case where this problem has been presented to the court.

THE HABENDUM CLAUSE

Another part of the oil and gas lease that has caused the courts great

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113211 Miss. 447, 51 So.2d 766 (1951).

114Cushenberry v. Waite-Phillips Co., 240 Pac. 400 (Kan. 1925).

115Anderson-Tully Co. v. Tingle, 166 F.2d 224 (5th Cir. 1948).

116Whitworth v. Mississippi State Highway Commission, 203 Miss. 94, 33 So.2d 612 (1948).

117New Orleans & Northeastern Railroad v. Morrison, 203 Miss. 791, 35 So.2d 68 (1948).

concern over the years has been the habendum clause. The habendum clause, like the rest of the lease, is a product of judicial evolution.[118] The habendum clause has been referred to as the quantum or duration of the estate.[119] Consequently, the question arises as to how long the lessee may operate under the terms of the oil and gas lease. Modern oil and gas leases contain a habendum clause with a certain term, know as the primary term, and with a so-called "thereafter clause." Producers 88 states it in this manner:

> Subject to the other provisions herein contained, this lease shall be for a term of ten years from this date (called 'primary term') and as long thereafter as oil, gas or other mineral is produced from said land or lands with which said land is pooled hereunder.

Though this habendum clause has been judicially attacked as being void for uncertainty and as a violation of the rule against perpetuities in the common law and as containing a potestative condition in the civil law, both of which contentions if sustained would render the mineral lease null and void, they have never prevailed in the courts of this nation.[120]

Professor Ford W. Hall[121] analyzes the habendum clause as follows:

> Actually there are two special limitations in the habendum clause: (1) failure to be producing oil or gas at the end of the primary term, and (2) cessation of production at anytime thereafter. Since both of these limitations turn on the term 'produced', they properly may be considered together. The first limitation requires that oil or gas must be in production at the end of the primary term for the lease to continue in existence. The second limitation applies to the 'thereafter' period and requires that oil or gas must be produced continually after the expiration of the primary term, in order to keep the lease in force. Since these two events are special limitations, they should be strictly enforced, inasmuch as they are not forfeiture provisions within the technical meaning of the term 'forfeiture.' In this connection equitable policy against strict enforcement of forfeitures is not involved, and there is no reason for applying in a case construing the habendum clause of an oil and gas lease, the familiar principles that equity abhors a forfeiture and will not lend its aid to enforce a forfeiture. The Courts have almost uniformly been rather strict in literally enforcing the terms of the habendum clause.

Much litigation has arisen in connection with what acts the lessee

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[118]2 Summers, The Law of Oil & Gas, § 282.

[119]See Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 7 Texas L. Rev. 563 (1929).

[120]Lloyd's Estate v. Mullen Tractor & Equipment Co., 192 Miss. 62, 4 So.2d 282 (1941); Francis v. Superior Oil Co., 102 F.2d 732 (10th Cir. 1939); Rosson v. Bennett, 294 S.W. 660 (Tex. 1927). See also Gennuso v. Magnolia Petroleum Co., 14 So.2d 445 (La. 1943).

[121]Hall, The Application of the Determinable Fee Theory in Construing the Mississippi Mineral Lease, 19 Miss. L.J. 296 (1948).

must perform within the primary term in order to reap the benefits of the "thereafter clause." The penalty for failure of the lessee to perform enough during the primary term is that the lease expires automatically and without the lessor's taking any affirmative action to terminate it.[122] There would appear to be four forms of habendum clauses under which the questions arise: (1) a fixed period and as long thereafter as oil or gas is found in paying quantities; (2) a fixed period and as long thereafter as oil or gas is produced in paying quantities: (3) a fixed period and as long thereafter as oil or gas is found; (4) a fixed period and as long thereafter as oil or gas is produced.[123] Considerable conflict in the decisions of the different jurisdictions exists, and they are impossible of reconciliation. As stated by Professor W. L. Summers:[124]

> A part of this uncertainty has been removed by a number of decisions holding that as here used the words FOUND and DISCOVERED mean the same thing as OBTAINED and PRODUCED. But this interpretation alone merely makes the habendum say that the lease shall continue THEREAFTER as long as oil and gas ARE PRODUCED or perhaps MAY BE PRODUCED in some quantity. THEREAFTER refers to the end of the definite term.

Some jurisdictions have held that the words "in paying quantities" in the habendum clause mean that the quantity must be sufficient to pay the lessee a profit, though small, over the operating expenses, although it may never repay the cost of the well and its operations, and that the whole may result in a loss to the lessee.[125] Other jurisdictions hold that production "in paying quantities" means profit to both the lessor and the lessee, and that in arriving at this determination the original consideration, the annual rentals, and the royalties are to be considered.[126] West Virginia[127] and Illinois[128] appear to be the only states that have held, when the "thereafter clause" calls for production only, that mere production, not necessarily in paying quantities, will keep the oil and gas lease in full force and effect beyond the primary term.

The Producers 88 Form currently used in Mississippi does not provide for "paying quantities." However, in light of the majority rule that production must be had in paying quantities even though the words be omitted,[129] it is the writer's opinion that if and when this problem is pre-

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122Stephenson v. Calliham, 289 S.W. 158 (Tex. 1926); Macco Const. Co. v. Fickert, 172 P.2d 951 (Cal. 1946).

123Kulp, Oil & Gas Rights, § 10.30, p. 587.

1242 Summers, The Law of Oil & Gas, § 293, p. 127.

125Decker v. Mid-Continent Petroleum Corp., 56 F.2d 725 (10th Cir. 1932), 84 A.L.R. 756; Walden v. Potts, 152 P.2d 923 (Okla. 1944).

126Noel Estate Inc. v. Murray, 65 So.2d 886 (La. 1953).

127South Penn. Oil Co. v. Snodgrass, 76 S.E. 961 (W. Va. 1913).

128Gillespie v. Ohio Oil Co., 102 N.E. 1043 (Ill. 1913).

129McLeon v. Wells, 180 S.W.2d 325 (Ark. 1944); Garcia v. King 164 S.W.2d 509 (Tex. 1942).

sented to the Mississippi Court for determination, the majority rule will be adopted in Mississippi.[130]

As the decisions indicate, the habendum clause is strictly construed, and the courts have consistently held that the lease terminates ipso facto for failure of the lessee to produce oil or gas during the primary term. However, many modern leases, contain provisions, such as the Force Majeure Clause, Shut-in Gas Royalty Clause, the Continual Drilling Clause, etc.,[131] which serve as mitigating factors against the harshness of this automatic termination and make it possible to extend the lease over and beyond the primary term without continuous production. But these clauses, too, are subject to automatic termination, in case of non-compliance with the terms thereof, and the habendum clause in Producers 88 is expressly made subject to these provisions.

The difficulty will disappear as time goes on, for modern leases expressly provide for these contingencies. Producers 88 states:

> If at the expiration of the primary term, oil, gas or other mineral is not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole thereon within sixty (60) days prior to the end of the primary term, the lease shall remain in force so long as operations are prosecuted with no cessation of more than sixty (60) consecutive days, and if they result in the production of oil, gas or other mineral, so long thereafter as oil, gas or other mineral is produced from said land or acreage pooled therewith. In the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within one hundred-fifty (150) feet of and draining the leased premises or acreage pooled therewith, Lessee agrees to drill such offset wells as a reasonably prudent operator would drill under the same similar circumstances.

Since the lessee must do something before the end of the primary term in all oil and gas leases, it is important to determine when it ends. The term begins to run from the date of the lease, not from the date of the delivery, if that is later. It was so held by the Supreme Court of Mississippi in *Hughes v. Franklin*.[132] If the lease is dated March 14, 1955, with a five year primary term, it ends on midnight March 14, 1960, the day of date being excluded.

One of the very recent pronouncements of the Supreme Court of Mississippi on the habendum clause was in *Superior Oil Co. v. Berry*,[133] where the court held that statutes, the rules of the oil and gas board,

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130The Millette v. Phillips Petroleum Company decision shows a definite tendency and indication on the part of the court toward this rule.

131These will be discussed later in this article.

132201 Miss. 215, 29 So.2d 79 (1947).

133216 Miss. 664, 64 So.2d 357 (1953).

the acts of the board, and the acts of the lessees in creating the drilling unit are controlling -- rather than the terms of the leases -- in determining whether production from the unit well would extend the primary terms of the unitized leases.

The question sometimes arises as to the effect of wrongful interference by the lessor during the primary term upon the rights of the lessee. Of course, these questions all depend upon the nature of the interference, but one court has held that if the lessor obtains an injunction against the lessee, the lessor cannot thereafter use this delay as a means to cancel the lease.[134] Nor can the lessor, through false and misleading information to the effect that the lease has expired, prevent the lessee from using the rights granted under the lease.[135] Surely, the same should be true if the lessor prevents the lessee from using the leased premises through armed force.

THE ROYALTY CLAUSE

The word "royalty" had its orgin in old common law, where the mines belonged to the sovereign and the right in the minerals reserved by the crown, upon the grant of the lands, was designated as royalty. This designation has persisted in the oil and gas lease to the present time. From an academic standpoint, royalty under an oil and gas lease has been discussed and analyzed by numerous writers. Some writers have compared royalty to rent,[136] while others have treated royalty as a part of the corpus of the property held by the lessor as an exception from the conveyance,[137] while still others consider royalty as a part of the purchase price of the lease.[138]

Royalty in an oil and gas lease has been defined rather universally as a share of the product or proceeds from the oil and gas lease reserved to the lessor as a part of the consideration for the execution of said lease.[139] Under Producers 88 royalty is calculated at 1/8 of the oil or gas produced and saved, free of all costs of drilling and operating save the severance taxes, and, in case the oil is unmerchantable, its proportionate cost to treat the oil to make it merchantable. In *Stokely v. State ex rel Knox*,[140] the Mississippi Supreme Court held the 7/8 working interest of the lessee in a mineral lease to be a vested interest in the oil and gas in

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134Continental Oil Co. v. Osage Oil & Refining Co., 69 F.2d 19 (10th Cir. 1934).

135Wheelock v. Batte, 225 S.W.2d 591 (Tex. 1949).

136Thornton, Law of Oil & Gas (5 Ed. 1932) §§ 363-364. See Pardue v. United Gas Public Service Co., 28 F. Supp. 847 (W. D. 1939).

137Simonton, The Nature of the Interest of the Grantee under an Oil & Gas Lease, 25 W. Va. L. Q. 295 (1918).

138See Walker, The Nature of the Property Interests Created by an Oil & Gas Lease in Texas, 7 Texas L. Rev. 30-31 (1928).

139Palmer v. Crews, 203 Miss. 806, 35 So.2d 430 (1938); Carroll v. Bowen, 68 P.2d 773 (Okla. 1937); State Nat'l. Bank v. Morgan, 143 S.W.2d 757 (Texas 1940).

140149 Miss. 435, 115 So. 563 (1928).

place; consequently, the corollary of this decision would be that the 1/8 royalty interest of the lessor is also a vested interest in the oil and gas in place. An overriding royalty is, under the ordinary commercial lease, a share of the lessee's 7/8th interest, usually known as the working interest retained by the lessee.[141] This is usually referred to as an override out of the working interest and is not chargeable with any of the expenses of drilling or operation except severance taxes,[142] and, in case the oil is unmerchantable, then its proportionate cost to treat the oil to make it merchantable. The owner of an overriding royalty interest has the same position in relation to the lessee as does the owner of a royalty interest.[143] Royalty existing solely by virtue of an oil and gas lease, of course, perishes with the lease. There are other types of royalty, such as the royalty formed by a direct grant from the landowner to a third person, that do not depend upon an oil and gas lease. These types of royalty are not considered herein.[144]

With the comparatively recent importance of gas, has come a greater consciousness on the part of the oil and gas industry for the gas royalty provision in the modern mineral lease. This has brought about basic differences between the oil royalty clause and the gas royalty clause in these leases. Under the terms of the oil royalty clause, the lessor is entitled to delivery of his 1/8 oil royalty in kind or to his credit in the pipeline, thereby vesting title in the lessor to 1/8 of the oil itself;[145] while, under the terms of the gas royalty clause, the lessee is entitled to the full 8/8 interest of the gas, thereby vesting title in the lessee to all the gas, subject to a money payment to the lessor for his royalty interest therein.[146] Another basic difference lies in the fact that the oil royalty price is calculated on the market price prevailing in the field where the well is located, whereas the gas royalty price is calculated on the market value at the wellhead. Transportation costs play a great part in this difference.

For a long time the problem whether or not casinghead gas was covered by the oil and gas lease gave the courts and the operators considerable concern.[147] However, it would appear that Louisiana, in its

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141La Laguna Ranch Co. v. Dodge, 114 P.2d 351 (Cal. 1941); Cities Service Oil Co. v. Geolograph Co., Inc., 254 P.2d 775 (Okla. 1953).

142Zephyr Oil Co. v. Cunningham, 265 S.W.2d 169 (Tex. 1954).

143Belgam Oil Co. v. Wirt Franklin Petroleum Corp., 209 S.W.2d 376 (Tex. 1948).

144Of considerable interest is the holding in Gulf Refining Co. v. Stanford, 202 Miss. 602, 30 So.2d 516 (1947), where our Supreme Court construed a mineral deed with a provision that in event of discovery of mineral, oil or gas, the grantor and grantee should share the "profits" equally as meaning that the grantor reserved an undivided ½ of the royalties payable under the lease.

145Dougherty v. Greene, 218 Miss. 250, 67 So.2d 297 (1953).

146Tide Water Associated Oil Co. v. Clemens, 123 S.W.2d 780 (Tex. 1938).

147Kulp, Oil & Gas Rights, Sec. 10.36. p. 606 (1954).

decision of *Wemple v. Producers' Oil Company*,[148] pioneered the legal thinking of the oil and gas industry in considering casinghead gas as being covered by an oil and gas lease. Other jurisdictions followed Louisiana in this regard, and today all modern oil and gas leases expressly include casinghead gas and the usual commercial lease fixes the royalty at 1/8.[149]

Another modern royalty provision is the so called "shut-in gas royalty."[150] This provision was necessitated by the lack of a market or the lack of pipeline facilities for the gas, when a successful well was produced near the expiration of the primary term. Under this clause the lease is maintained in full force and effect until such time as the lessee is able to procure a market for the gas or obtain pipeline facilities for getting the gas to market,[151] even though it extends the lease beyond the primary term. These shut-in gas royalty payments have been held to be in the nature of royalty and, accordingly, payable to the royalty owners.[152] The courts have uniformly given effect to the shut-in gas royalty clause even though it would appear to be in direct conflict with the habendum clause of the lease.[153] But the courts are not in accord as to the length of time lessee may keep the lease effective beyond the primary term by the continuous payment of shut-in royalty.[154] Some modern oil and gas lease forms require the lessee to make the shut-in royalty payment within sixty days after the shutting in of the well, while Producers 88 sets forth no time limit for the payment. Of course, it is logical to assume, under a Producers 88 lease form, that the courts would hold the shut-in royalty payment to be timely if made within a reasonable time. The writer is of the belief that, under usual conditions, ninety days would not be an unreasonable limitation. It has been held that in order to get the benefit of the shut-in royalty payment, in extending the lease beyond the primary term, the payment must be made in advance of the last day of

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148 83 So. 232 (1919).

149 Producers 88, paragraph 3 contains the following: "(b) on gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacturer of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale. . ."

150 A representative caluse is: "Where gas from a gas well is not sold or used, Lessee may pay as royalty $100.00 per well per year and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof. . ."

151 See Scurlock, Practical and Legal Problems in Delay Rentals and Shut-in Royalty Payments, Fourth Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, p. 38 et seq. (1953).

152 Morris v. First Nat'l Bank, 249 S.W.2d 269 (Tex. 1952).

153 See Note 139 supra.

154 In Benedum-Trees Oil Co. v. Davis, 107 F.2d 981 (6th Cir. 1939) (the well was shut-in for 9 years) the court held the lease had terminated. While the well was shut-in for four years before sale of gas in Gathright Land Co. v. Kentucky-West Virginia Gas Co., 65 F.2d 907 (6th Cir. 1933), Court held the lease in full force and effect.

the primary term.[155] Under the royalties provision of the modern oil and gas lease the lessor is given, at his risk and expense, the right to use for domestic purposes gas not needed for operations, free of cost; and conversely the lessee is not obligated to pay royalty on oil and gas used or consumed in the actual production of oil or gas.[156] But if used for a purpose foreign to development of the leasehold, then the lessor is entitled to royalty thereon.[157]

Difficult problems arise where, after a certain tract of land is leased for oil and gas, the lessor sells a part of the tract. The minority rule[158] is that the royalty is to be divided among the owners of the entire tract, while the vast majority rule[159] is that the royalty is to be paid only to the owner of the land where the well is located. These are often referred to as the apportionment theory and the non-apportionment theory, respectively. The Mississippi case of *Gulf Refining Company v. Griffith*[160] would indicate that Mississippi has adopted the minority rule. Nevertheless, a close analysis of the decision will reveal that it was based upon a peculiar situation which was controlled by the rules and regulations of the Oil and Gas Board and that the majority rule still prevails in Mississippi as exemplified in *Merrill Engineering Company v. Capital National Bank of Jackson*.[161]

Where owners of different tracts of land join in the same oil and gas lease, the question as to whether each lessor shares in the production regardless of the particular tract from which it comes is determined from the lease provisions and the surrounding circumstances. However, many courts hold such a lease to be a community lease,[162] and, therefore, all the lessors participate in all of the production from all of the lands. This would appear to be the prevailing rule in Mississippi.[163]

In passing, the practitioner's attention is attracted to the holding of the courts that non-payment of royalty under an oil and gas lease does not

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[155]Freeman v. Magnolia Petroleum Co., 171 S.W.2d 339 (Tex. 1943).

[156]Guffey v. Stroud, 16 S.W.2d 527 (Tex. 1929). See also Ohio Oil Co. v. Bruch, 124 N.E. 781 (Ind. 1919).

[157]Mussellem v. Magnolia Petroleum Co., 231 Pac. 526 (Okla. 1924).

[158]Clark v. Elsinore Oil Co., 31 P.2d 476 (Cal. 1934); Wettengel v. Gormley, 28 Atl. 934 (Pa. 1894).

[159]Boren v. Burgess, 97 F. Supp. 1019 (E.D. Okla. 1951); Corlock v. Krug, 99 P.2d 858 (Kan. 1940); Hinds v. McCord, 45 S.W.2d 442 (Tex. 1931); See 3 Summers, The Law of Oil & Gas, § 608.

[160]215 Miss. 15, 60 So.2d 518 (1952).

[161]192 Miss. 378, 5 So.2d 666 (1942).

[162]Gillis v. Royalty Service Corp., 204 P.2d 968 (Cal. 1949); Hunt v. McWilliams, 240 S.W.2d 865 (Ark. 1951); Southland Royalty Co. v. Humble Oil & Refining Co., 249 S.W.2d 914 (Tex. 1952). In Irick v. Hubbell, 280 P.2d 733 (Okla. 1955), the lessors signed separate but identical leases and the court held the result to be the same as a community lease. See Hoffman, Voluntary Pooling and Unitization, § 4, p. 50 (1954).

[163]See Hudson v. Newell, 172 F.2d 848 (5th Cir. 1949); Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85 (1952).

terminate the lease, in the absence of a specific clause to that effect, but will give rise to an action for damages.

Inasmuch as the royalty on the other minerals produced under the terms of the modern mineral lease is clearly set out in the lease,[164] a discussion thereof is foregone.

The pooling clause in Producers 88 provides:

> In lieu of the royalties elsewhere herein specified, Lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved.

And the lease further provides in paragraph 8:

> If six or more parties become entitled to royalty hereunder, Lessee may withhold payment thereof unless and until furnished with a recordable instrument executed by all such parties designating an agent to receive payment for all.

THE POOLING CLAUSE

Obsessed by the possibilities of quick and big fortunes in oil and gas, the early operators literally tried to get rich overnight and, as a consequence, great waste of natural resources and many economic losses resulted.[165]

As soon as the oil producing states realized this, the movement for the conservation of oil and gas resources began. The outgrowth of this movement is the conservation acts of today.[166] These conservation acts provide for proper spacing of wells and the fixing of drilling units.[167]

Under the rules and regulations of the boards entrusted with the execution of these conservation acts, a unit is required to contain a certain amount of acreage.[168] But exceptions were allowed by the board in worthy cases. Without express authority to pool, the lessee has no right to pool the interest in the estate retained by the lessor with the interests of other lessors, which would have the effect of reducing lessor's royalty

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164Producers 88, Paragraph 3, contains the following: "(c) on all other minerals mined and marketed, one-tenth either in kind or value at the well or mine, at Lessee's election, except that on sulphur mined and marketed, the royalty shall be fifty cents (50c) per long ton. Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessor's wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used."

165The writer is reliably informed that in the East Texas Oil Field alone over 25,000 unnecessary oil wells were drilled in the boom era of that field representing over $125,000,000 in steel and labor literally thrown away.

166Merrill, The Evolution of Oil & Gas Law, 13 Miss. L.J. 289 (1941); Moses, The Constitutional Legislative and Judicial Growth of Oil & Gas Conservation Statutes, 13 Miss. L.J. 353 (1941).

167Miss. Code Ann. § 6132 et seq. (1942). See Myers, Spacing, Pooling & Field Wide Unitization, 18 Miss. L.J. 267 (1947).

168In Mississippi the oil unit is comprised of 40 acres, while the gas unit is comprised of 320 acres.

and extending the terms of the lease.[169] Many situations arose where the oil and gas lease did not contain a clause or provision for pooling, and the conservation board, considering the situation not warranting an exception to their rules, would not grant the lessee a permit to drill. To extricate themselves from future predicaments of this nature, the lessees began to insert provisions for pooling in their lease forms and out of this grew the pooling clause in the oil and gas lease today.[170]

Generally it is not considered necessary to secure pooling agreements from owners of royalty interests, because, in most instances, the acquisition of such interests arises subsequent to the execution of an oil and gas lease containing a pooling clause.[171] However, there are cases where royalty interests have been acquired prior to the procurement of the oil and gas lease, in which event a pooling agreement from the owners of such royalty interests is necessary in order to pool their interests.[172]

There are some leases in force today which do not contain pooling clauses. It has been held that owners of royalty interests, purchased subsequent to a lease containing no pooling clause, cannot execute pooling agreements that will bind the lessors.[173] If a unit of two or more oil and gas leases without pooling provisions is to be drilled, all parties, lessors as well as royalty owners, must sign a pooling agreement before the lessee can validly drill the well.[174] This is known as voluntary pooling. Pooling may be compulsory through the conservation board,[175] or it may come about through the mere execution of a community oil and gas lease.[176]

The effect of pooling is to cause the production from any portion of the unit to have the same effect as if it were from each of the tracts of land comprising the unit, regardless of the actual location of the well.[177]

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[169]Knight v. Chicago Corp., 188 S.W.2d 564 (Tex. 1945).

[170]Producers 88 provides: "Lessee, at its option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof with other land, lease or leases in the immediate vicinity thereof, when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said premises in compliance with any lawful spacing rules which may be prescribed for the field in which this lease is situated by any duly authorized authority, or when to do so would, in the judgment of Lessee, promote the conservation of the oil and gas in and under and that may be produced from said premises."

[171]See Hoffman, Voluntary Pooling and Unitization, pp. 190-192 (1954).

[172]Brown v. Smith, 174 S.W.2d 43 (Tex. 1943).

[173]See Humble Oil & Refining Co. v. Hutchins, 217 Miss. 636, 64 So.2d 733 (1953).

[174]See Merrill Engineering Co. v. Capitol Nat'l Bank, 192 Miss. 378, 5 So.2d 666 (1942).

[175]Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 844 (1952).

[176]See Southland Royalty Co. v. Humble Oil & Refining Co., 249 S.W.2d 914 (Tex. 1952); Parker v. Parker, 144 S.W.2d 303 (Tex. 1940).

[177]See Superior Oil Co. v. Berry, 216 Miss. 664, 63 So.2d 115 (1953); Hudson v. Newell, 172 F.2d 849 (5th Cir. 1949); Producers 88, Paragraph 4 provides: "The entire acreage so pooled into a tract or unit shall be treated, for all purposes except the payment of royalties on production from the pooled unit, as if it were included in this lease. If production is found on the pooled acreage, it shall be treated as if production is had from this lease, whether the well or wells be located on the premises covered by this lease or not."

Judicial approval has been given to the modern pooling clause insofar as it affects that portion of the leased acreage not included in the producing unit. The courts have held that the lease is perpetuated as to the entire acreage therein described upon production within the unit in paying quantities, even though the production be from a well not on the leased property.[178] But the pooling agreement may validly provide against this result.[179] It has also been held by our Supreme Court that, where the lease does not contain a pooling clause and forced unitization takes place, production from the unit incorporating only a portion of the leased land does not extend the primary term of the lease as to all of the leased land, but only as to that portion of the leased land incorporated into the unit.[180] The rights of pooling in the lease must be exercised in good faith by the lessee, and productive land cannot be pooled with unproductive land to the disadvantage of the lessor.[181]

Under the further provision of the pooling clause, the lessee is obligated to designate by description the acreage pooled.[182] Though the lease does not provide for the placing of the description of the unit instrument of record, nevertheless, recordation is an accepted procedure in the oil and gas industry. In the event of production, royalties under a particular lease are calculated according to the ratio of the amount of leased acreage in the unit to the total acreage in the unit.[183] *In Humble Oil & Refining Company v. Welbourn,*[184] the Supreme Court of Mississippi held that pooling was accomplished on a surface acreage basis and not according to the thickness of the producing sands. Our Supreme Court has also held that the State Oil and Gas Board cannot validly order integration of noncontiguous lands into the same unit.[185] Its latest pronouncement on pooling came in the case of *Superior Oil Company v. Magee,* where the designated gas well drilling unit contained approximately five acres less than the three hundred twenty acres required at the time of the formation thereof; but, under the proper description of the land in the unit, lessees designated the unit, made certificate of pooling, and executed operating agreements thereon, and the Oil and Gas Board

178Scott v. Pure Oil Co., 194 F.2d 393 (5th Cir. 1952); See also Trawick v. Castleberry, 275 P.2d 292 (Okla. 1953); Jackson v. Hunt Oil Co., 23 So.2d 31 (La. 1945); Gray v. Cameron, 234 S.W.2d 769 (Ark. 1950).

179Humble Oil & Refining Co. v. Hutchins, 217 Miss. 636, 64 So.2d 733 (1953).

180Texas Gulf Producing Co. v. Griffith, 218 Miss. 109, 65 So.2d 447 (1953).

181Imes v. Globe Oil & Refining Co., 84 P.2d 1106 (Okla. 1938).

182Paragraph 4, also provides: "Lessee shall execute in writing an instrument identifying and describing the pooled acreage."

183Paragraph 4, further provides: "In lieu of the royalties elsewhere herein specified, Lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or his royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved."

184216 Miss. 180, 62 So.2d 211 (1953).

185Superior Oil Co. v. Griffith, 214 Miss. 891, 60 So.2d 505 (1952).

issued a permit to drill and granted production allowables, and the well was completed. The Court held that a "de facto" unit was established, that all the interests in the unit were validly integrated, and that production from the unit extended the primary terms of the leases insofar as the acreage in the unit was concerned.[186]

THE RENTAL CLAUSE

The first oil and gas leases were, as mentioned before, simple contracts stated in a few words. But as the problems grew, so did the lease grow. A situation that did much to bring about the change in the oil and gas lease occurred in those instances where, for good reasons, the lessee wished to delay the drilling and at the same time retain his rights under the lease. The early oil and gas lease, which was commonly called the drill or forfeit lease, had no provision for delayed drilling.[187] The only alternative for the lessee, under these circumstances, was to forfeit the lease.[188] Consequently, a new clause was added to the lease whereby the lessee could delay drilling operations during the primary term by paying a certain amount of money to the lessor from year to year. This payment was known as the annual delay rental and was defined as a sum of money paid in advance by the lessee for the right of deferring the drilling operations during the year covered by the payment.[189] Thus came into being the so-called "Or" lease under which the lessee had the choice of drilling or paying a rental.[190] But the "Or" lease, too, proved unsatisfactory. For, under its terms, the lessee, if he chose not to drill, would still be liable for the payment of delay rentals during the remainder of the fixed term.[191]

Out of this dissatisfaction evolved the popular "Unless" lease that we have in use today, which gives to the lessee the threefold right to drill, or to pay rentals, in lieu of drilling, or to terminate the lease.[192] If the lessee decides to drill, he is under no obligation to pay rentals, and if he chooses to pay rentals, then he is under no obligation to drill, even though the lease has a provision for the development of the property with due diligence.[193] No liability arises in favor of the lessor against the

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186Superior Oil Co. v. Magee, 87 So.2d 280 (Miss. 1956).

187John v. Elberta Oil Co., 13 P.2d 538 (Cal. 1932). Though this is the old type of lease, nevertheless, it has been used in recent years. See Muth v. Aetna Oil Co., 188 F.2d 844 (7th Cir. 1951); Bland v. Barkalow, 117 F. Supp. 1 (W. D. La. 1953); Reynolds v. McNeill, 236 S.W.2d 723 (Ark. 1951).

188Duff v. Dubose, 14 S.W.2d 911 (Tex. 1929); Davenport v. Doyle Petroleum Corp., 100 P.2d 445 (Okla. 1940).

189Alphin v. Gulf Refining Company, 39 F. Supp. 570 (W. D. Ark. 1941); Carroll v. Bowen, 68 P.2d 773 (Okla. 1937).

190See Waggoner Est. v. Sigler Oil Co., 19 S.W.2d 27 (Tex. 1929).

191Texas Pacific Coal & Oil Co. v. Gholson, 1 S.W.2d 649 (Tex. 1927).

192Humble Oil & Refining Co. v. Harrison, 205 S.W.2d 355 (Tex. 1947). The Supreme Court of Mississippi in Chism v. Hollis, 152 Miss. 772, 118 So. 713 (1928) held that lessee had same option under "or" lease.

193Simms Oil Co. v. Colquitt, 296 S.W. 491 (Tex. 1927).

lessee should the lessee fail to drill a well or to pay rentals under the terms of the mineral lease.[194] At first consideration, the "Or" lease and the "Unless" lease appear to be very similar, for both are options to drill a well or pay rentals, but they do have basic differences. This is particularly so, in those instances when the lessee breaches his obligations under the lease. In the "Or" lease, failure of the lessee to drill or pay entitles the lessor, at his option, to re-enter and forfeit the lease[195] while, in the "Unless" lease, non-performance of these obligations by the lessee terminates the lease ipso facto.[196]

Under the "Unless" oil and gas lease, time is of the essence.[197] Accordingly, the time for payments of delay rentals, as well as the deferment for successive twelve month periods, during the primary term is fixed by express provision.[198] In lieu of drilling, the payment must be made on or before a certain date to prevent the termination of the lease.[199] The Supreme Court of Mississippi has held that the lessee has the entire day of the certain date for rental payment, but that, if lessee fails to pay by the certain date, the lease automatically terminates.[200] In *Love Petroleum Co. v. Atlantic Oil Producing Co.*[201] our Supreme Court held, where the mineral lease was delivered with the day in March on which annual rental was to be paid left blank, the lessee had the right to pay rental on any day in March. The Texas Court[202] has held, where a second "Unless" lease was executed by the lessor to the same lessee for the purpose of correcting a mistake in the first lease, that the date of the first lease and not the date of the correction lease determined the time for the payment of the rental. However, in *Dougherty v. Greene,*[203] our Supreme Court held, where an owner purchased the land subject to a mineral lease and thereafter entered into a new lease with the original lessee, that all rights under the original lease ceased and the rights thereafter would be

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194White v. Hunt, 193 Miss. 742, 10 So.2d 539 (1942). See also Gulf Production Co. v. Continental Oil Co., 164 S.W.2d 488 (Tex. 1942).

195Curry v. Texas Co., 18 S.W.2d 256 (Tex. 1929).

196Killam v. Erlich, 243 S.W.2d 419 (Tex. 1951).

197Hammonds v. Flewellen, 48 S.W.2d 813 (Tex. 1932).

198Producers 88 has the typical rental clause and it reads as follows: "If operations for drilling are not commenced on said land or on acreage pooled therewith as above provided on or before one year from this date the lease shall then terminate as to both parties, unless on or before such anniversary date lessee shall pay or tender to lessor or to the credit of lessor in Bank at ....., Mississippi (which bank and its successors are lessor's agent and shall continue as the depository for all rentals payable hereunder regardless of change in ownership of said land or rentals) the sum of ..... Dollars ($.....), (herein called rental), which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months. In like manner and upon like payments or tenders annually the commencement of drilling operations may be further deferred for successive periods of twelve (12) months each during the primary term. . . ."

199Hughes v. Franklin, 201 Miss. 215, 29 So.2d 79 (1947).

200Hughes v. Franklin, 201 Miss. 215, 29 So.2d 79 (1947),

201169 Miss. 259, 152 So. 829 (1934).

202Humble Oil & Refining Co. v. Mullican, 190 S.W.2d 392 (Tex. 1945).

203218 Miss. 250, 67 So.2d 297 (1953).

measured wholly by the terms of the new lease. It also appears that, if the lessor accepts the rental payment after the due date, he may be estopped from asserting that the lease had terminated by the failure of the lessee to pay on the fixed date.[204] It has also been held that, when the rental date fell on Sunday, the time for payment was extended to midnight of the next day.[205] But in the computation of the time for the payment of rentals, intervening Sundays and holidays are always included.[206]

Originally the only legally acceptable means of paying rentals, under an oil and gas lease, was through the payment of money,[207] but today practically all modern leases[208] provide for the payment of rentals by check or draft. Our Supreme Court has held that the lessor's retention of a cashier's check mailed by the lessee for the annual rental was tantamount to an acceptance thereof.[209] In the case of mail, the postal service is made the agent for the lessor, and, if the rental payment is properly mailed but never delivered, this, nevertheless, constitutes a valid payment under the lease[210] In a recent Louisiana case,[211] this was extended to include a payment by telegraph service, where the rental money was placed in the telegraph office on the due date and received by the lessor some days after the rental due date. It must be borne in mind, however, that if the "Unless" lease contains no provision for mailing and the rental check is mailed, but does not reach the bank until after the due date, mailing will not constitute payment and the lease will terminate automatically.[212]

Some of the errors in the payment of rentals come about because of confusion of the title of the land embraced within the oil and gas lease with the lease contract itself. This was exemplified in an adjoining community property state,[213] where the husband alone executed the oil and gas lease on the community property and the lease was terminated because the lessee improperly paid the rentals to the wife as well as to the husband. This was further accentuated in *Gulf Refining Co. v. Shat-*

204Mitchell v. Simms, 63 S.W.2d 371 (Tex. 1933).

205Durell v. Miles, 206 P.2d 547 (N. M. 1949).

206Armstrong v. McGough, 247 S.W. 790 (Ark. 1923).

207Stern v. Maxwell, 44 S.W.2d 482 (Tex. 1931).

208Producers 88, provides: "The payment or tender of rental may be made by the check or draft of lessee mailed or delivered to lessor or to said bank on or before such date of payment. If such bank (or any successor bank) should fail, liquidate or be succeeded by another bank, or for any reason fail or refuse to accept rental, Lessee shall not be held in default for failure to make such payment or tender of rental until 30 days after lessor shall deliver to lessee a proper recordable instrument, naming another bank as agent to receive such payments or tenders. . . ."

209See note 201 supra.

210Hitz v. Ohio Fuel Gas Co., 183 N.E. 768 (Ohio 1932).

211Baker v. Potter, 65 So.2d 598 (La. 1952).

212Appling v. Morrison, 227 S.W. 708 (Tex. 1921).

213LeRosen v. North Central Texas Oil Co., 126 So. 442 (La. 1930).

ford,[214] where Shatford, purchaser of the minerals then under an "Unless" oil and gas lease with a provision for the rentals to be paid "on or before" a certain date, merely wrote to the lessee, Gulf Refining Company, about his purchase; the lessee answered his letter requesting a certified copy of the deed, pursuant to the provision in the lease; Shatford failed to furnish same until 10 days before the rental date, which was after the rental payment had been made by the lessee to the former owner. The Court said: "To now permit Shatford to cancel the lease so far as it affects his 1/8 interest would be to reward him for his negligence and punish Gulf for living up to its contract. The rental money had been sent to the lessor's agent bank prior to the time Gulf received copies of Shatford's deeds. Shatford should not now look to Gulf for his portion of that money; he should look to those persons who received it—the persons from whom he secured his interest." Somewhat in this category, but in the reverse, is the Mississippi case of *White v. Hunt,*[215] where under an "Unless" oil and gas lease, one assignee of a part of the lease, who was required to pay $40 rental for the renewal of his interest, erroneously made timely payment of $80, the Court held that such overpayment did not renew the interests of the assignees of the other part of the lease who failed to pay the rentals on their interests.

The practitioner, at times, is confronted with the problem whether or not to advise his client, the lessee under a lease from joint lessors containing no agreement as to the division of the rentals, to make separate rental payments to these lessors or deposit separate rental payments to their individual bank accounts. There is no satisfactory answer to this, but surely the safest procedure would be to make the payment of the rentals to all lessors jointly. This method has been held to be judicially proper.[216]

The manner of payment of the rentals presents many questions and the answers to these questions differ somewhat in every jurisdiction. But, be that as it may, under Producers 88 Form it appears to be the best and safest procedure, in paying rentals to the depository bank, to make the check payable to the order of the bank for the credit of the lessor. For it is not safe to make the check payable to the lessor without express provision in the lease, and the bank has no right to endorse the lessor's name unless specifically authorized. Most courts have held the bank to be the lessor's agent. Consequently, if the bank receives the payment of the rental and fails to credit the lessor's account with same until after the due date, practically any court would uphold the propriety of the lessee's method of rental payment under the lease.

214159 F.2d 231 (5th Cir. 1947).
215193 Miss. 742, 10 So.2d 539 (1942).
216Perkins v. Magnolia Petroleum Co., 148 S.W.2d 266 (Tex. 1941).

The rental clause in Producers 88 further provides that the lessee may release a portion of all of the leased acreage and thereby relieve himself of all obligations connected therewith; that in the event of the death of a person entitled to rentals, the lessee may pay the rentals to the credit of the deceased person or his estate; and that the lessee may pay the rentals, in case of two or more persons being entitled to them, jointly or separately.[217]

THE DRILLING AND REWORKING CLAUSE

Inasmuch as the main objective in the execution of the oil and gas lease is the drilling and development of the land for oil or gas,[218] it is not surprising that the drilling and reworking clauses in the leases have, over the years, caused great concern in the courts of the producing states. In the earlier leases, it was generally held that, once drilling was begun during the primary term and the drilling operations resulted in a dry hole, the lessee could not resume the payment of rentals and thereby keep the lease effective,[219] and that only subsequent drilling of wells would maintain the lease. To meet this problem the insertion of certain provisions was made in the lease as it appears today,[220] whereby the lessee, after

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[217]Producers 88, paragraph 5: "Lessee may at any time or times execute and deliver to Lessor or to the depository above named or place of record a release or releases covering any portion or portions of the above described premises and thereby surrender this lease as to such portion or portions and be relieved of all obligations as to the acreage surrendered, and thereafter the rentals payable hereunder shall be reduced in the proportion that the acreage covered hereby is reduced by said release or releases." The lease further provides in paragraph 8: "In the event of the death of any person entitled to rentals hereunder, Lessee may pay or tender such rentals to the credit of the deceased or the estate of the deceased until such time as Lessee is furnished with proper evidence of the appointment and qualifications of an executor or administrator of the estate, or if there be more, then until lessee is furnished with evidence satisfactory to it as to the heirs or devisees of the deceased and that all debts of the estate have been paid. If at any time two or more persons be entitled to participate in the rental payable hereunder, Lessee may pay or tender said rental jointly to such persons or to their joint credit in the depository named herein; or, at Lessee's election, the proportionate part of said rental to which each participant is entitled may be paid or tendered to him separately or to his separate credit in said depository; and payment or tender to any participant of his portion of the rentals hereunder shall maintain this lease as to such participant. In event of assignment of this lease as to a segregated portion of said land, the rentals payable hereunder shall be apportionable as between the several leasehold owners ratably according to the surface area of each, and default in rental payment by one shall not affect the right of other leasehold owners hereunder."

[218]Millette v. Phillips Petroleum Co., 209 Miss. 687, 48 So.2d 344 (1950); Paraffine Oil Co. v. Cruce, 162 Pac. 716 (Okla. 1917).

[219]See Hall, The Application of the Determinable Fee Theory in Construing the Mississippi Mineral Lease, 19 Miss. L.J. 291, (1948).

[220]Producers 88, paragraph 6 recites: "If prior to discovery of oil, gas or other mineral on said land or on acreage pooled therewith Lessee should drill a dry hole or holes thereon, or if after discovery of oil, gas or other mineral, the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or reworking operations within 60 days thereafter or if it be within the primary term, commences or resumes the payment or tender of rentals or commences operations for drilling or reworking on or before the rental paying date next ensuing after the expiration of 60 days from the date of completion of dry hole or cessation of production."

an unsuccessful attempt to produce a well and during the primary term, can keep the lease in effect by the resumption of the payment of rentals or by the commencement of additional drilling or reworking operations on or before the rental paying date next ensuing after the expiration of sixty days from the date of the completion of the dry hole or cessation of production. At first reading these stipulations would appear to confuse, but such is not the case. It merely means that, if the unsuccessful drilling operations were completed within sixty days before the rental date and during the primary term, the lessee is relieved of the obligation of paying rentals on that date and of paying rentals or drilling before the next ensuing rental date. These clauses have been upheld by the courts.[221] The question always resolves itself into what the lessee must do to comply with his obligation under the drilling clause.

The lessee may choose any portion of the land leased as a site for the well,[222] when there is no provision in the lease to the contrary, and his selection of the location cannot be controlled by the lessor or by any subsequent assignee of the lessor.[223] Since time is of the essence of an oil and gas lease, the lessee must commence drilling operations on or before the designated date in the drilling clause[224] and pursue his drilling operations in a bona fide manner. What constitutes a commencement of a well under the terms of the oil and gas lease depends upon the facts and circumstances. It has been held that the location of a well site, the obtaining of a water supply and the placing of the derrick timbers on the location, all in good faith, constituted commencement of operations for the drilling of a well.[225] And it has also been held that an attempt to secure necessary equipment for drilling would not constitute commencement of drilling operations.[226] Actual drilling, in the absence of good faith, will not prevent the lease from terminating.[227]

Drilling operations once started must be continued pursuant to the provisions and obligations under the lease,[228] and, where the lease is silent as to the manner in which drilling should be accomplished, the lessee should proceed in good faith and with reasonable diligence.[229] The courts are not prone to excuse the lessee who fails to develop the leased

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221Harrel v. Atlantic Refining Co., 123 F. Supp. 70 (E.D. Okla. 1954); Wilson v. Texas Co., 76 P.2d 779 (Kan. 1938).

222Gulf Oil Corp. v. Marathon Oil Co., 152 S.W.2d 711 (Tex. 1941). Producers 88 contains prohibition against drilling within 200 ft. of a residence or barn on leased land.

223Hoffman v. Magnolia Petroleum Co., 260 S.W. 950 (Tex. 1924).

224Whelan v. Shell Oil Co., 212 S.W.2d 991 (Tex. 1948).

225Caldwell v. Alton Oil Co., 108 So. 314 (La. 1926); See also Heard v. Pratt, 257 S.W. 660 (Tex. 1923).

226Dunbar v. Fuller, 253 S.W.2d 684 (Tex. 1952).

227Street v. Masterson, 227 S.W. 407 (Tex. 1925), where water well drilling rig was used.

228Rogers v. Osborn, 261 S.W.2d 311 (Tex. 1953).

229Guleke v. Humble Oil & Refining Co., 126 S.W.2d 38 (Tex. 1939).

premises, after he has discovered oil or gas thereon, and it has been held that a financial depression is no excuse for lessee's failure to develop the lease.[230] Nor is the failure of the discovery well to be profitable an excuse for non-development.[231] The query here is as to what depth the lessee must drill to complete his obligation under the lease. It would appear that, if the lessee drills to a depth at which oil and gas are usually encountered in the particular area, he has satisfied his obligations,[232] even though he finds no oil or gas at that depth.[233] However, a California court has held that, where no limit as to depth is recited in the lease, the lessee has the right to drill to any depth for oil and gas, whether the producing sand was known or unknown at the time the lease was obtained.[234] Of course, if the lease recites the depth to be drilled, the lessee must comply with the requirement in good faith.[235] A very interesting and certainly a pioneer case for Mississippi is *Martin v. Texas Gulf Producing Company*.[236] Here, the contention was made that the production of gas from one horizon in the unit would not support the lease as to oil in all horizons and as to gas in all other horizons, after the expiration of the primary term. Our Supreme Court, in holding that gas production from one horizon would maintain the lease as to all horizons for oil and gas, said, "We cannot agree to that contention. . . . There is no contractual obligation to drill to any named strata or depth. The obligation is to locate a well on the 'land' described in the lease. That was done within the meaning of the law as announced in the foregoing cases when the well was brought in on the unit of which the leased land was a part."

Now, let us give consideration to the drilling clause at that period, near or after the expiration of the primary term of the oil and gas lease. The majority rule seems to be, in the absence of a special provision in the lease, that the lease terminates automatically, if no discovery of oil or gas has been made during the primary term, even though the lessee is prosecuting drilling operations on the land in a bona fide manner at the time of the expiration.[237] The minority rule, in a situation of this nature, is that the lessee has the right to complete his drilling, even in the absence of a special stipulation, and if the lessee brings in a producing well, the lease continues in full force and effect.[238] The modern oil and gas lease

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230Masterson v. Amarillo Oil Co., 253 S.W. 908 (Tex. 1923).

231Texas Pacific Coal & Oil Co. v. Barker, 6 S.W.2d 1031 (Tex. 1928).

232Hennessey v. Brewer, 282 S.W. 617 (Tex. 1926).

233Britton v. Cotton States Petroleum Co., 283 S.W. 887 (Tex. 1926).

234Kidwell v. General Petroleum Corp. of California, 300 Pac. 1 (Cal. 1931).

235Cresswell v. Dixie Co., 6 S.W.2d 380 (Tex. 1928).

23679 So.2d 270 (Miss. 1955).

237Tate v. Stranolind Oil & Gas Co., 240 P.2d 465 (Kan. 1952); Union Gas & Oil Co. v. Adkins, 278 Fed. 854 (6th Cir. 1922). See 2 Summers, The Law of Oil & Gas, § 303.

238Consolidated Gas Co. v. Rieckhoff, 151 P.2d 588 (Mont. 1944); Lester v. Mid South Oil Co., 296 Fed. 661 (6th Cir. 1924).

provides for just such an emergency by setting out in detail how the lessee can keep the lease effective beyond the primary term by continual drilling or reworking operations.[239] When this provision is inserted in the lease, the courts have held that compliance therewith by the lessee maintains the lease.[240] This particular provision in the modern lease also covers the situation where a producing well ceases to produce after the expiration of the primary term, by providing that the lease shall not terminate if the lessee commences additional wells or reworking operations on the original wells within sixty days after cessation of production.[241]

The drilling clause[242] further provides that if at any time within sixty days of the beginning of the last year of the primary term and prior to the discovery of oil, gas or other mineral on said land, or on acreage pooled therewith, the lessee should drill a dry hole thereon, no rental payment of operations are necessary in order to keep the lease in force during the remainder of the primary term. There is also a provision in the drilling clause that, in the event a well or wells producing oil or gas in paying quantities should be brought in on adjacent land and within 150 feet of and draining the leased premises, or acreage pooled therewith, lessee will drill such offset well as a reasonably prudent operator would drill under the same similar circumstances. In view of the Mississippi Conservation Act[243] and the rules and regulations of the State Oil and Gas Board,[244] it would appear that this last provision has become a bulwark of defense for the lessee against the demands of the lessor for development. But the same provision was rendered impotent by the Mississippi Supreme Court in the recent case of *Millette v. Phillips Petroleum Company*,[245] wherein it held that an express covenant which absolves the lessee from drilling offset wells does not relieve the lessee of liability for substantial drainage by him. Producers 88, in paragraph 7, contains a prohibition that no well shall be drilled within 200 feet of any resi-

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239Producers 88, paragraph 6 recites: "If at the expiration of the primary term, oil, gas or other mineral is not being produced on said land, or on acreage pooled therewith, but Lessee is then engaged in drilling or reworking operations thereon or shall have completed a dry hole thereon within 60 days prior to the end of the primary term, the lease shall remain in force so long as operations are prosecuted with no cessation of more than 60 consecutive days, and if they result in the production of oil, gas or other mineral, so long thereafter as oil, gas or other mineral is produced from said land or acreage pooled therewith."

240St. Louis Royalty Co. v. Continental Oil Co., 193 F.2d 778 (5th Cir. 1952); Bain v. Portable Drilling Corp., 198 P.2d 207 (Okla. 1948).

241See note 239 supra.

242See Mississippi Producers 88, Paragraph No. 6.

243Miss. Laws 1948, c. 256, § 6 (c).

244Order No. 18-48, State Oil and Gas Board, sec. F, 6-a: "[A]nd the location of the well shall not be closer than 330 feet from the exterior boundaries of the drilling unit."

245209 Miss. 687, 48 So.2d 344 (1950). See the thorough discussion of this decision by Prof. Arthur B. Custy in 26 Miss. L.J. 35 (1954).

dence or barn on the leased premises without the consent of the lessor. This limitation is for the sole benefit of the lessor, but it does not give the lessor the right to drill thereon.[246] Where the lessee drilled and produced a gas well within these 200 feet, over the protest of the lessor, a Pennsylvania Court,[247] in holding for the lessor, restrained the lessee from producing any of the gas from the well.

Though this article is limited to a discussion of the express covenants in the modern oil and gas lease, nevertheless, no article seems complete without some mention of the implied covenants. Consequently, let it be said that the leading legal authority[248] on this subject holds that there are four implied covenants in the modern oil and gas lease: the implied covenant to drill an exploratory well; the implied covenant to drill additional wells; the implied covenant for diligent and proper operation of the wells and for marketing the product, if oil or gas is discovered in paying quantities; the implied covenant to protect the leased premises against drainage by wells on adjoining land. To these four, a prominent authority in Mississippi[249] has added a fifth, namely, "the implied covenant that lessee will do nothing to impair the values of the lease and that said lessee will use reasonable care to protect the lessor from drainage by the lessee's own affirmative acts."

THE ASSIGNMENT CLAUSE

The courts have held that the lessee's estate and interests in an oil and gas lease are assignable, where the lease contained no provision against assignment, under the general rule that all contracts, excepting those requiring personal skill and confidence, are assignable.[250] The lessee's interest may be transferred in whole or in part[251] and the assignee of the portion assigned is vested with the same rights, powers and duties as to that portion that the original lessee possessed.[252] Assignees of various parts of an oil and gas lease have been regarded by the courts as owning parcels of one undivided lease-hold estate and not as owning separate and independent oil and gas leases.[253] This rule has, in effect, been adopted by Mississippi through the decision in *Berry v. Tide Water Associated Oil Company*.[254] Of course, the right and power of operating

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246McFarlane v. Gulf Production Co., 204 S.W. 460 (Tex. 1918).

247Kelly v. Phillips Gas & Oil Co., 105 Atl. 631 (Pa. 1918).

248Merrill, Covenants Implied in Oil and Gas Leases, § 4, p. 23 (1940).

249An excellent speech, Implied Covenants by Earl T. Thomas, was delivered on December 3, 1954, before the Mississippi Law Institute, Jackson, Mississippi.

250Watts v. England, 269 S.W. 585 (Ark. 1925). See also Heffington v. Hellums, 212 S.W. 2d 245 (Tex. 1948).

251Knight v. Chicago Corp., 188 S.W.2d 564 (Tex. 1945).

252Pearson v. Black, 120 S.W.2d 1075 (Tex. 1938).

253See Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 10 Texas L. Rev. 314 (1932); contra, Hunt v. Clifford H. Brown & Co., 239 S.W.2d 178 (La. 1951).

254188 F.2d 820 (5th Cir. 1951).

the lease is assignable too,[255] and, consequently, the assignee receives not only an interest in the property but also the right to develop the premises.[256] In the recent Mississippi case of *Whitten v. Daws*,[257] the court held that there was no fiduciary relationship between the assignor and the assignee and, accordingly, the assignees, when they discovered they did not have full title to the minerals under the assignments, were free to purchase the outstanding interests for themselves without any obligation on their part to account to the assignor therefor.

The modern oil and gas lease expressly confers upon the lessee the authority to assign it. It may provide in plain terms that the privilege of assigning in whole or in part is expressly granted to the lessor and the lessee[258] and that the covenants and agreements of the lease shall be binding upon their heirs, successors and assigns, which is tantamount to an agreement that the lease shall be assignable.[259] However, the change or division in such interests will not operate to enlarge or diminish the rights of the lessee or the assignee.[260] It has been held that, where several persons own an oil and gas lease, execution of the assignment by less than all of the owners, unless those that executed the assignment were authorized to act for the others, will not suffice.[261]

There is also a provision in the modern oil and gas lease, whereby no change in the ownership shall be binding upon the lessee until the lessee has furnished with proper evidence of such a transfer or assignment, usually with a certified copy of such instrument.[262] Such a provision in the lease was held to be valid and binding in *Gulf Refining Company v. Shatford*.[263]

Mississippi has recognized the right of assignment in a mineral lease to be a divisible one.[264] Under the assignment clause of the modern oil and gas lease, if a lessee assigns a portion of the oil and gas lease, his

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255Goodloe & Meridith v. Harris, 94 S.W.2d 1141 (Tex. 1936).

256See Cole Petroleum Co. v. United States Gas & Oil Co., 41 S.W.2d 414 (Tex. 1931).

25783 So.2d 744 (Miss. 1955).

258Producers 88, paragraph 8 states: "The rights of either party hereunder may be assigned in whole or in part, and the provisions hereof shall extend to their heirs, successors and assigns. . ."

259Jackson v. Pure Oil Operating Co., 217 S.W. 959 (Tex. 1919).

260Terrell v. Munger Farm Co., 129 S.W.2d 407 (Tex. 1939).

261See Morrison v. Reece, 266 S.W. 815 (Tex. 1924).

262Producers 88 paragraph 8 further states: "[B]ut no change or division in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished by registered U. S. mail at Lessee's principal place of business with a certified copy of recorded instrument or instruments evidencing same. In the event of assignment hereof in whole or in part liability for breach of any obligation hereunder shall rest exclusively upon the owner of this lease or of a portion thereof who commits such breach."

263159 F.2d 231 (5th Cir. 1947).

264See White v. Hunt, 193 Miss. 742, 10 So.2d 539 (1942).

assignee, in lieu of drilling, needs only to pay rentals on his proportionate part of the lease in order to protect his interest in the lease. The lessee is vested with the same privilege insofar as his proportionate part of the lease is concerned.[265] Of course, under this same provision of the oil and gas lease, the lessee has the right to release any or all of the premises embraced within the lease and thereby relieve himself of any further obligation attached to that part of the leased premises.[266] The lessor, under this provision, has comparable rights of assignability.

THE FORFEITURE CLAUSE

Probably the most "double-talked" problem in the oil and gas lease is that of forfeiture, and probably the most misused expression. Forfeiture of an oil and gas lease has been held to mean that the lessee has failed to perform some obligation, and, as a consequence of said failure, has lost contractual rights he would ordinarily have had, had the lease terminated by its own limitations.[267] Though there is an established rule that forfeitures in law are not favored,[268] nevertheless, some courts have favored forfeitures[269] in oil and gas leases. It has been held that the failure of the lessee to drill or pay rentals under the terms of an "or" lease will give the lessor the right to forfeit the lease,[270] while the failure of the lessee to drill or pay rentals under the terms of an "unless" lease automatically terminates the lease.[271] In *Scruggs v. Clark*,[272] the Mississippi Supreme Court held that when the lessor accepts regular monthly royalties from the lessee under a mineral lease with full knowledge of the nature and the extent of the operations by the lessee, the lessor is estopped to claim forfeiture of the lease on the ground that the lessee has not carried on the operations as required by the lease.

Under these circumstances, the forfeiture clause contained in Producers 88[273] would appear to hold an anomalous position in the Mississippi law. After considering a somewhat comparable forfeiture clause, Pro-

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265See note 264 supra.

266See Producers 88, paragraph 5.

267Stephenson v. Callihan, 289 S.W. 158 (Tex. 1926).

268Thornton v. City of Natchez, 88 Miss. 1, 41 So. 498 (1926). See 23 Am. Jur., Forfeitures § 598 et. seq. and N. O. G. N. RR. v. Belhaven Heights Co., 122 Miss. 190, 84 So. 178 (1920).

269Stephenson v. Callihan, 289 S.W. 158 (Tex. 1926).

270Texas Pacific Coal and Oil Co. v. Gholson, 1 S.W.2d 649 (Tex. 1927).

271Hughes v. Franklin, 201 Miss. 215, 29 So.2d 79 (1947); Killam v. Erlich, 243 S.W.2d 419 (Tex. 1951).

272213 Miss. 290, 56 So.2d 805 (1952).

273Producers 88, Paragraph 9 contains: "The breach by Lessee of any obligation hereunder shall not work a forfeiture or termination of this lease nor be cause for cancellation hereof in whole or in part save as herein expressly provided. If the obligation should require the drilling of a well or wells, Lessee shall have ninety (90) days after the receipt of written notices by Lessee from Lessor specifically stating the breach alleged by Lessor within which to begin operations for the drilling of any such well or wells. . ."

fessor Ford W. Hall[274] expressed it in this manner:

> A moment's thought will lead to the conclusion that this clause can have no effect on either the habendum or delay rental clauses, inasmuch as neither the failure to be producing at the end of the primary term, nor failure to continue production during the secondary period, nor failure either to drill or to pay delay rentals involves the breach of an obligation, but all such events are special limitations marking the termination of the lease by its own terms and requiring no sort of affirmative action whatsoever on the part of the lessor.

Apparently the only portion of the forfeiture clause that would prove beneficial in Mississippi would be that portion which has to do with the failure of the lessee properly to develop the premises.[275]

THE WARRANTY AND REDUCTION CLAUSE

Practically all modern oil and gas leases contain a warranty[276] and reduction clause.[277] The purpose of this is obvious. In the majority of the areas where leasing is taking place, the lease buyer is unable from an economic, as well as a time, standpoint, to abstract and to examine the title to each and every piece of land that he wishes to lease, and, as a consequence, he is wholly at the mercy of the landowner for an ascertainment of the landowner's mineral interest in the land to be leased. The land owner himself, in many instances, is unable to ascertain with certainty his mineral interest in the land, because of the confusion of title or because of some other defect. Faced with such a situation, the lessee can and usually does protect himself by a clause in the lease to the effect, that if the lessor owns less than the entire mineral interest in the land, then his rentals and royalties will be reduced proportionately. At times the lessors will eliminate the reduction clause from the lease; when this is done, the rental stipulated in the lease cannot be reduced without loss of the lease.

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[274]Hall, The Application of the Determinable Fee Theory in Construing the Mississippi Mineral Lease, 19 Miss. L.J. 291 (1948).

[275]Paragraph 9 further contains: "the only penalty for failure so to do shall be the termination of this lease save as to forty (40) acres for each well being worked on or producing oil or gas, to be selected by Lessee so that each forty (40) acre tract will embrace one such well. After the discovery of oil, gas or other mineral in paying quantities on said premises, Lessee shall reasonably develop the acreage retained hereunder, but in discharging this obligation it shall in no event be required to drill more than one well per forty (40) acres of the area retained hereunder and capable of producing oil, gas or other mineral in paying quantities."

[276]Producers 88, paragraph 10 recites: "Lessor hereby warrants and agrees to defend the title to said land and agrees that Lessee at its option may discharge any tax, mortage or other lien upon said land, either in whole or in part, and in event Lessee does so, it shall be subrogated to such lien with right to enforce same and apply rentals and royalties accruing hereunder toward satisfying same."

[277]Said Paragraph 10 further recites: "Without impairment of Lessee's rights under the warranty in event of failure of title, it is agreed that if Lessor owns an interest in said land less than the entire fee simple estate, then the royalties and rentals to be paid Lessor shall be reduced proportionately. Failure of Lessee to reduce rental paid hereunder shall not impair the right of Lessee to reduce royalties."

There appear to be few judicial pronouncements involving the warranty clause in the modern lease. This is readily understandable, when one considers that the lessee rarely ever forces the lessor, through court action, to return the overpayment of bonus or rentals in the case of a partial or a full failure of the mineral title. Nevertheless, there have been instances in which the lessee recovered from the lessor the overpayment of bonus and royalty when the mineral title failed.[278] This has also resulted in the matter of rentals when failure of the mineral title occurred.[279] And recovery of rental overpayments have been allowed in those cases where there were deficiencies of acreage.[280] In acreage deficiency, the rule would appear to be that, if the rental is fixed at a certain amount per acre, the lessee may recover, while, if the rental is fixed at a lump sum, without regard to acreage, then the lessee cannot recover.[281] Probably, the most equitable rule applicable to the warranty clause in the mineral lease is to be found in *Martel v. Hunt*,[282] where the Louisiana Court held that the warranty clause would be enforced only if the parties specifically intended that the warranty clause should govern and that the lessee relied upon the warranty clause. It is the belief of the writer that, in all likelihood, this rule will be adopted by the Mississippi Courts, if and when the problem is presented to them for a decision.

The reduction clause in the modern oil and gas lease has generally been upheld.[283] However, a problem that has kept title examiners in a quandary over the reduction clause was pointed up in the very informative case of *The Texas Co. v. Parks*.[284] The lessor, in this case, owned only an undivided mineral interest in the land leased and the land description in the lease expressly recited such undivided interest, while said lease contained the usual reduction clause. The court, called upon to decide the effectiveness of the said reduction clause, held that the proportionate ownership clause referred to the fractional interest described in the lease and not to the entire tract of land, and, therefore, that any reduction of the rental recited in the lease would render the lease ineffective. In the absence of a Mississippi decision interpreting this clause, the practitioner, while preparing mineral leases for his clients, would be wise to keep *The Texas Company v. Parks* decision in mind and to avoid any reference to an undivided interest of the lessor in the land description, or, if he must refer to the interest in the description, then to eliminate the reduction clause from the lease. This will prevent any conflict between these provisions.

278Liles v. Barnhart, 93 So. 490 (La. 1922).
279Kentucky-West Virginia Gas Co. v. Preece, 86 S.W.2d 163 (Ky. 1935).
280Warfield Natural Gas Co. v. Cassady, 86 S.W.2d 276 (Ky. 1935).
281Piney Oil and Gas Co. v. Allen, 32 S.W.2d 325 (Ky. 1930).
282197 So. 402 (La. 1940).
283Hove v. Atchison, 138 F. Supp. 486 (N.D. 1956).
284247 S.W.2d 179 (Tex. 1952).

THE FORCE MAJEURE CLAUSE

One of the recent acquisitions of the modern oil and gas lease has been the "force majeure" clause.[285] As the words imply, it means, "Acts of God." However, this clause has been extended to include such modern difficulties as labor troubles, industrial disturbances, war, and numerous other happenings of this nature.[286] In addition to the force majeure clause, Producers 88 has included under the same category any federal or state law or any order, rule, or regulation of a governmental authority, that prevents the lessee from complying with his obligations under the lease. Upon the happening of any of these eventualities, the lessee's obligations under the lease are suspended during the duration and the lessee is not liable in damages for failure to comply therewith. In other words, it includes practically anything that may delay or hinder the lessee's operations under the lease.

Worthy of note is a recent decision of a Louisiana Court[287] wherein it held that the force majeure clause kept an oil and gas lease effective beyond the primary term of the lease, without production, when the lease was placed in a cycling unit by the Louisiana Conservation Commissioner before the primary term of the lease expired and the cycling plant was not placed in operation until sometime after the expiration of said primary term.

In light of the liberal interpretation given the force majeure clause in other producing states, it is logical to believe that the Mississippi Court would accord this clause the same treatment in this state.

CONCLUSION

This article does not, nor is it intended to cover the many-angled problems that arise from the express provisions of the modern oil and gas lease, but it is intended to point up and discuss those problems arising from the express provisions which appear to occur most frequently and seem to cause the most difficulty to the title examiner. With the hope that it has accomplished this objective, the writer rests his case.

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[285]Producers 88, Paragraph 11 provides: "Should Lessee be prevented from complying with any express or implied covenant of this lease, from conducting drilling or reworking operations thereon or from producing oil or gas therefrom by reason of scarcity of or inability to obtain or to use equipment or material, or by operation of force majeure, or any Federal or state law or any order, rule or regulation of governmental authority, then while so prevented, Lessee's obligation to comply with such covenant shall be suspended, and Lessee shall not be liable in damages for failure to comply therewith; and this lease shall be extended while and so long as Lessee is prevented by any such cause from conducting drilling or reworking operations on or from producing oil or gas from the leased premises; and the time while Lessee is so prevented shall not be counted against Lessee, anything in this lease to contrary notwithstanding."

[286]See Gulf form 3238-D.

[287]Hunter Co., Inc. v. Vaughn, 46 So.2d 735 (La. 1950). But see Haby v. Stanolind Oil and Gas Co., 228 F.2d 298 (5th Cir. 1955), the court holding the lease terminated, where it contained no "force majeure" clause and the Railroad Commission of Texas had issued an order shutting-in the well which was maintaining the lease, thereby preventing further production.

RECENT LEGISLATION IN MISSISSIPPI ON THE SCHOOL SEGREGATION PROBLEM

*William F. Winter**

In the juristic no-man's land that has developed in the wake of the Supreme Court decisions of May, 1954, and May, 1955, in the school segregation cases,[1] it is admittedly much too early to make a wholly satisfactory appraisal, from a legal standpoint, of the considerable number of legislative proposals which have been advanced in Mississippi and in most of the other southern states during that period on this subject. It goes without saying that the best legal minds of the south have been engaged in the monumental task of seeking to develop a course of action which will, by recognizable lawful means, result in the maintenance of the long-established pattern of segregated public school facilities. It must suffice here merely to catalog and note for future reference some of the measures which were passed by the Mississippi legislature at its last session.

In a discussion of this legislative activity it will be well to review several significant aspects of the problem. In the first place, as was pointed out by Judges Parker, Dobie and Timmerman in their decision in one of the cases[2] remanded to them by the Supreme Court, the Supreme Court decisions do not make it unlawful *per se* to maintain segregated school systems, and school districts which continue to operate separate schools for the two races on a voluntary basis are not violating the Constitution or any law of the United States. What the court has said, opined the judges in the Carolina case, was simply that the federal judiciary will no longer protect a system of separate schools against an attack under the "equal protection" clause of the fourteenth amendment.[3] These decisions do not mean, therefore, that a local citizenry cannot con-

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[1]Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

[2]Briggs v. Elliott, 132 Fed. Supp. 776 (E.D.S.C., 1955).

[3]Ibid. The Court spelled out its interpretation of the Supreme Court decision as follows: "... it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the school which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation."

tinue for many years, by mutual consent and agreement, to operate wholly and completely within the law on a separate but equal basis. Let no one fail though, as on too many occasions we have failed in the past, to emphasize in this pattern of operation the importance of the word "equal" in the aforementioned term. When all is said and done, it may be that of all the Mississippi legislation passed in this field, none will prove more valuable toward the maintenance of public school segregation than that setting up the monumental school equalization program in 1953-54.[4]

A second reality that must be faced if our legislative activity is to be effective is that in any future determination of the validity of laws seeking to avoid integration in the schools, the laws must be based on criteria other than color or race. The pupil assignment law,[5] passed initially in Mississippi prior to the Supreme Court decision in 1954 and since adopted in principle by several other states, reflects a recognition of that fact. There appears at this early stage strong reason to believe that very pertinent factors such as "the educational needs and welfare of the child involved, the welfare and best interest of all the pupils attending the school or schools involved, the availability of school facilities, sanitary conditions and facilities at the school or schools involved, [and] health and moral factors at the school or schools and in the community involved,"[6] will be accepted by the courts as valid and legitimate bases for assignment of pupils. Added reassurance on this score stems from a recent decision of the Fourth Circuit Court of Appeals,[7] wherein that Court refused to strike down arbitrarily the North Carolina pupil assignment law, saying, "We cannot hold that the act is unconstitutional upon its face and the question as to whether it has been unconstitutionally applied is not before us, as the administrative remedy it provides has not been invoked."[8]

Even in the unexpectedly harsh Louisiana decision[9] last spring, wherein the Eastern District Court of that state summarily struck down the recently enacted pupil assignment law, the court took note of the fact

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[4]Of $9,103,729 in approved projects to date, $6,777,847 will be spent on projects for Negroes and $2,325,882 on white facilities. Southern School News, Dec. 1956, p. 7.

[5]Miss. Laws 1954, c. 260.

[6]Ibid. Governor J. P. Coleman, in his inaugural address on January 17, 1956, had the following to say: "Our pupil assignment law, which has been on the statute books since 1954, and which has not yet been challenged, is, in my opinion within itself, a complete remedy at the present time."

[7]Carson v. Warlick, (no citation at this time).

[8]Ibid. The *Carson* case was a mandamus action brought against the federal judge of the Western District of North Carolina, who had dismissed a school integration suit on the grounds that the Negro plaintiffs had not exhausted their administrative remedies under the North Carolina pupil assignment law. The Circuit Court of Appeals refused to issue the writ, which would have required the District Judge to hear the case.

[9]Bush v. Orleans Parish School Board, 138 Fed. Supp. 337 (E.D. La. 1956).

that no specific assignment standards were set up, intimating that a different result could conceivably have obtained under less arbitrary statutory arrangements.[10] But the task of maintaining segregation by state legislative enactment admittedly remains a difficult one — not so much from the standpoint of the formulation of the statutes as in their application. For when the net result of a statutory procedure is to bring about continued compulsory segregation, the state will, to say the least, have the burden of showing that such a result is incidental to the accomplishment of another purpose that the courts will recognize as desirable and proper. As far as the federal judiciary is concerned, the constitutional ice appears to get rather thin at this point.

Finally it is only realistic to say that failing on both of the above named fronts, the drastic last-ditch step of closing the public schools would unquestionably be the result in those areas of this state and several other states where integration becomes imminent. The way was cleared for such action by the ratification of a constitutional amendment in December, 1954, setting up the basic machinery for such a step.[11] It would be expected that private schools would supply the educational need in the communities affected, but undoubtedly those institutions would be obliged to operate on a strictly private subscription basis. In the interest of orderly and effective educational processes for the children of both races, it can only be hoped that it may not be necessary to put such extreme measures into effect. And it can be said with some optimism that such an unhappy alternative is nowhere on the horizon in Mississippi at the present time.

The keynote for Mississippi's legislative activity in this field was set by Governor J. P. Coleman in his inaugural address on January 17, 1956, when he said:[12]

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[10]Ibid. The court included the following significant language in its decision: "Should Act 556 be considered alone and not part of the over-all legislative plan, then it is invalid as an unlawful delegation of legislative authority for the reason that no standards on which the superintendent may base his assignment of children are included therein . . . The only standards for assignment given in the plan is in Act 555 which provides for segregation of the races, which is, of course, invalid under Brown. . ."

[11]Miss. Laws 1955, c. 132. The following language was included in this amendment: "(b) Regardless of any provision of Article 8, or any other provisions of this Constitution to the contrary, the Legislature shall be and is hereby authorized and empowered by a two-thirds (2/3rds) vote of those present and voting in each House, to abolish the public schools in this state, and enact suitable legislation to effect the same. (c) Regardless of any provision of Article 8, or any other provisions of this Constitution to the contrary, the Legislature shall be and is hereby authorized and empowered, by a majority vote of those present and voting in each House, to authorize the counties and school districts to abolish their public schools, and enact suitable legislation to effect the same."

[12]Address of Governor J. P. Coleman to Miss. Legislature January 17, 1956. The Governor significantly directed some of his remarks to the Negroes of the state as follows: "I am pledged to maintenance of the separation of the races at all costs, but I want to say this further word to the Negroes of Mississippi—As Governor I shall always

> [W]e would maintain the separation of the races *without at the same time keeping our state, its economy, its customs, and its practices, in a daily uproar of confusion and uncertainty.* I want to tell you that during the next four years the full weight of the government will unfailingly be used to the end that Mississippi *will be a state of law and not of violence.*

But at the same time that he counseled a non-inflammatory course, the governor left no doubt as to the state's steadfast determination to maintain a policy of segregation by saying:

> With all due respect to the mightly power of the United States Government, it will never be able to force racial integration in Mississippi nor in any other state where the people are unwilling to have it done.

It is significant that at the time of the 1956 session and to this date Mississippi has been free of litigation on the subject. Under such favorable conditions, and in accordance with Governor Coleman's forthright inaugural declaration, it was not deemed necessary to resort to extensive legislative action. Much of the legislation which was enacted was on the basis of recommendations made by the Legal Educational Advisory Committee, established by the 1954 legislature and consisting of top state officials, legislators, and other leaders.[13] The state was apparently willing to stand pat on the enactments already passed, while seeing to it that the mammoth school equalization program proceeded apace.

Among the specific legislative proposals passed at the 1956 session, the one dealing most directly with the school segregation problem was House Bill 31,[14] which repealed the compulsory school attendance law. The attendance law, while having been on the books for many years, had never been strenuously enforced, but its repeal was based on the idea that its continued presence on the statute books could provide a conflict with efforts to implement the recently enacted consitutional amendment giving the legislature authority to abolish public schools in the state, should subsequent events make that necessary.

Another of the bills recommended by the Legal Educational Advisory Committee was a measure[15] requiring all educators in public educational institutions to file an affidavit listing all organizations of which they had been members during the preceding five years or to which they had made financial contributions. Obviously, such a measure was designed to hinder the operation of the NAACP or other radical groups within the state and to ascertain who in the teaching profession were members of that organization or similar organizations.

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give sympathetic consideration to any of your problems which deserve the assistance of the state government. If you accept this opportunity, it will mean better days for all of us. If you reject it, the responsibility must be yours. . ."

[13]Miss. Laws 1954, c. 420.

[14]Miss. Laws 1956, c. 288.

[15]Miss. Laws 1956, c. 265.

Still another bill directed against the NAACP was House Bill 33,[16] which prohibits the fomenting and agitation of litigation and the solicitation, receipt, or donation of funds for the purpose of prosecuting a lawsuit. This is a criminal statute and was conceived with the idea of discouraging activities on the part of NAACP agitators.[17]

A companion measure was House Bill 35[18] providing additional regulations with respect to the practice of law in Mississippi by out-of-state attorneys. The Board of Bar Admissions was vested with additional authority to limit the privilege of appearing before any court or administrative agency by subjecting the applicant to inquiries concerning his "professional standing, moral character and familiarity with the ethics, principles, practices, customs and usages of the legal profession."

A bill which apparently had its foundation in the 1954 pupil assignment law was Senate Bill 1954,[19] which provides for the abolition of common law marriages. When it is understood that the prospective effect of the repeal of the common law marriage statute will be to render the children of all such future unions illegitimate, it is conceivable that the enactment of this measure could have some effect in the application of the assignment law, as it deals with health and morals.

One of the bills recommended by the Legal Educational Advisory Committee and passed by the legislature was subsequently vetoed by Governor Coleman. This measure was House Bill 30, which sought to discourage civil rights investigations in the state, and presumably its application would have been directed toward agents of the federal government. Under that measure it would have been unlawful for any person "to conspire to injure, oppress, threaten or intimidate any citizen of Mississippi in the free exercise or enjoyment of any right, privilege or immunity secured to him by the Constitution or laws of the State of Mississippi."[20] Another LEAC Bill which was adopted was House Bill 34,[21] which makes it unlawful "for any person or persons to use any profane, vulgar, indecent, threatening, obscene or insulting language over any

[16]Miss. Laws 1956, c. 253.

[17]Ibid. The following language is used to define the Act's purpose: "Nothing in this act is intended to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy; the intent, as herein set out, is to prohibit and punish, more clearly and definitely, champerty, maintenance, barratry, and the solicitation or stirring up of litigation, whether the same be committed by licensed attorneys or by others who are not real parties in interest to the subject matter of such litigation."

[18]Miss. Laws 1956, c. 255.

[19]Miss. Laws 1956, c. 239.

[20]In his veto message to the legislature, Governor Coleman had the following to say: "Since Mississippi has nothing to fear from any honest investigation limited to federal questions and since we have nothing to hide, nothing of which we are ashamed, and therefore nothing to fear, I have concluded it to be the better part of statesmanship, calculated to serve our best interest in the years to come, at this time to stay our hand, doing so in the sincere hope that the proud record of the past will not hereafter be sullied by unjustifiable harassment, meddling, or interference."

[21]Miss. Laws 1956, c. 261.

telephone." This is a criminal statute designed to discourage telephone threats which have been used against certain state officials from time to time during the segregation controversy.

An enactment of special significance was House Bill 880[22] creating the State Sovereignty Commission, which was charged with the duty "to do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi and her sister states from encroachment thereon by the Federal Government or any branch, department or agency thereof and to resist the usurpation of the rights and powers reserved to this state and our sister states by the Federal Government or any branch, department or agency thereof."

This commission, consisting of the Governor, the Attorney General, the President of the Senate and the Speaker of the House, three citizens appointed by the Governor, one from each Supreme Court District, two members of the State Senate appointed by the President of the Senate, and three members of the House appointed by the Speaker of the House, was granted an appropriation of $250,000 to carry on its work during the current bennium. There has been set up a full time office to carry on the duties of the commission and to act as a fact-finding body for the state government. In addition, the commission has functioned as a medium of informing other sections of the country of the problems of the state with respect to integration. In connection with this undertaking, a group of New England newspapermen were conducted on a week's tour of the state in the fall of 1956 to permit them to gain a more accurate perspective of the state's economic and social problems.

The action of the 1956 session of the legislature which gained the most attention was the passage not of a law but of a concurrent resolution relating to the much-discussed subject of interposition.[23] That resolution, which was drafted by a special legislative committee, was offered as an official statement of protest by this state against the federal action in the school segregation cases, and was passed unanimously through both houses of the legislature. This move paralleled the action of several other southern states in that regard. The resolution provided among other things:

> That the Legislature of Mississippi asserts that whenever the Federal Government attempts to engage in the deliberate, palpable and dangerous exercise of powers not granted to it, the states who are parties to the compact have the right and are in duty bound to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights and liberties appertaining to them; . . .
>
> The State of Mississippi declares that it is the duty and privilege of a state to object to the aforesaid invasion of its rights and

[22]Miss. Laws 1956, c. 365.
[23]Miss. Laws 1956, c. 466.

> does hereby interpose its sovereignty to protect these rights; it is the duty of the Congress to halt such practices and save these rights; and if such cannot be obtained other than by amendment to the Federal Constitution, we appeal to the Congress, in the exercise of the power granted under Article 5 of the Constitution, to initiate and submit an appropriate amendment direct to the forty-eight states for ratification by three fourths (3/4) of the Legislatures thereof, declaring that the states have never surrendered their rights and powers to control their public schools, colleges and other public institutions and facilities to the Federal Government, or any department or agency thereof, but such powers are reserved to the states; and until such time as these wrongs are righted, we do hereby declare the decisions and orders of the Supreme Court of the United States of May 17, 1954, and May 31, 1955, to be a usurpation of power reserved to the several states and do declare, as a matter of right, that said decisions are in violation of the Constitution of the United States and the State of Mississippi, and therefore, are considered unconstitutional, invalid and of no lawful effect within the confines of the State of Mississippi. . .
>
> We declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to void this illegal encroachment upon our rights, and we do hereby urge our sister states to take prompt and deliberate action to check further encroachment by the Federal Government, through judicial legislation, upon the powers of all states.[24]

In pursuance of the declarations contained in the interposition resolution, Senate Bill 1870[25] was passed later in the session "to give effect to the resolution . . . and to the principle of segregation of the races." This bill called on all state, local and municipal officials to implement the effect of the interposition resolution by complying "fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi and said Resolution of Interposition, and are further directed and required to prohibit by any lawful, peaceful and constitutional means the implementation of or the compliance with the integration decisions of the United States Supreme Court of May 17, 1954, and of May 31, 1955, and to prohibit by any lawful, peaceful and constitutional means the causing of a mixing of integration of the white and negro races in public schools, public parks, public waiting rooms, public places of amusement,

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[24]Ibid. The basis for the action was stated in the drafting committee's report in part as follows: "It is historically a State's right to interpose the sovereignty of the State between the Federal Government and object to its encroachment upon powers reserved to the States. This right rests in the incontrovertible theory that ours is a union of sovereign states; that the Federal Government exists only by reason of a solemn compact among the States; that each respective State is a coequal party to this compact; that if the compact is violated by the Federal Government, every State has a right to judge of the infraction; and when an issue of contested power arises, only the States themselves by Constitutional process, may finally decide the issue."

[25]Miss. Laws 1956, c. 254.

recreation or assembling in this state by any branch of the Federal Government. . ."[26]

It should not be out of place in this discussion to mention other legislation dealing with the segregation problem but not directly related to the educational aspect of the controversy. Among these acts was House Bill 26,[27] which was a measure to prohibit any person from creating a disturbance or breach of the peace in any public place of business and was a companion bill to House Bill 21,[28] which specifically granted any person or firm engaged in any public business in the state the right to refuse to sell, to wait upon or serve any person that the place of business desired not to sell, wait upon or serve.

In connection with the now much publicized bus controversies arising in other states, we call attention to House Bills 7,[29] 12,[30] and 22,[31] requiring railroad companies, bus companies or other common carriers to maintain separate accommodations for the races in intrastate travel; requiring them to maintain and operate waitings rooms for passengers separately and with separate toilet facilities; and prohibiting persons traveling in intrastate travel from entering and using the waiting rooms not marked and provided for such persons.

As was pointed out in an earlier discussion of this subject, it would be hazardous to predict that any permanently effective state legislative action can be devised that will guarantee of and by itself the maintenance of segregation in the schools. In the face of recent lower court decisions in other states, it seems realistic to believe that the application of any statute that has the effect of continuing a pattern of mandatory segregation will be invalidated. That does not mean, though, that southern legislators should throw up their hands at the seeming difficulty of their task. For what they do by the recognized legislative processes to promote that which they believe to be in the interest of their states is a well-recognized part of our nation's political heritage. Certain it is that the interests of democracy will be served if the conflicts of men can be resolved in the reason and dignity of the legislative chamber rather than in the unreasoning frenzy of the mob in the street. This is the task that recent events have placed before the lawmakers of the southern states. The results thus far of their labors in Mississippi should have the approbation of all who are genuinely interested in the most effective development of educational opportunities for the children of both races.

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[26]Ibid.
[27]Miss. Laws 1956, c. 256.
[28]Miss. Laws 1956, c. 257.
[29]Miss. Laws 1956, c. 258.
[30]Miss. Laws 1956, c. 259.
[31]Miss. Laws 1956, c. 260.

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RECENT DECISIONS

Gift Tax — Applicability to Exercise of Special Power of Appointment

The plaintiff's father transferred a block of stock in trust, with the income to be paid to plaintiff for life, and remainder to plaintiff's descendants. By the trust instrument, the plaintiff was given the right at any time during his life to appoint by deed all or part of the trust property to or among his descendants. The plaintiff exercised this limited power of appointment by the execution of two deeds giving one hundred shares to each of his children. The gift tax was paid. This suit is to recover the taxes paid. Held: The gift tax is inapplicable to limited power of appointment, and therefore, the controverted transaction did not constitute a taxable gift. *Self v. United States*, 142 F. Supp. 939 (Ct. Cl. 1956).

Prior to the Internal Revenue Act of 1942, there were no specific provisions for the taxing of powers of appointment, and there existed a conflict of decision on whether an inter vivos exercise of a general power of appointment was taxable as a gift.[1] In the 1942 act, Congress provided for taxation of powers of appointment.[2] The 1942 section pertaining to powers of appointment was repealed and replaced by the Powers of Appointment Act of 1951,[3] which took effect as if it had been passed at the time of the 1942 act.[4] The 1951 act has been substantially reenacted in the Internal Revenue Code of 1954.[5] The principal case does not offer anything new or novel in the field of gift taxation. The court has only reiterated the position it took under similar statutary language prior to the passage of the Internal Revenue Act of 1954. The case does serve the purpose of offering an excellent basis for the scrutiny of the newly issued proposed treasury regulations.

According to the proposed regulations: "[t]he term 'power of appointment' includes all powers which are in substance and effect powers of appointment received by the donee of the power from another person, regardless of the nomenclature used in creating the power and regardless of local property law connotations."[6] Ordinarily, only the exercise of the release of a 'general power of appointment' is taxable as a gift. A general power is defined as any power of appointment exercisable in favor of the possessor, his estate, his creditors, or the creditors of his estate.[7] An inter vivos exercise of a pre-1942 general power of appointment will be deemed a transfer of the property by the individual posses-

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[1]Edith E. Clark, 47 B.T.A. 865 (1942) (release not taxed); Richardson v. Comm'r, 151 F.2d 211 (2d Cir. 1945) affirming P-H 1943 T.C. Mem. Dec., (exercise taxed); Mable F. Grasselli, 7 T.C. 225 (1946) (exercise taxed); Comm'r v. Walston, 168 F.2d 211 (4th Cir. 1948) affirming 8 T.C. 72 (exercised taxed).

[2]Int. Rev. Code of 1942; § 452, 56 Stat. 942 (1951).

[3]65 Stat. 91 (1951).

[4]This would account for the establishment of October 22, 1942 as the cutoff date.

[5]Int. Rev. Code of 1954, § 2514.

[6]TD proposed regulation § 25.2514-1 (b), 22 Fed. Reg. 53 (1957).

[7]Id., § 25.2514-2 (c). The only special power of appointment that is taxable as a gift is where a post-1942 power exercised so as to create another power under which the vesting of the property may be suspended for a period ascertainable without reference to the date of the creation of the first power. Int. Rev. Code of 1954, § 2514 (d).

sing the power.[8] The conflict of decision between *Richardson v. Comm'r*[9] and *Blumberg v. Smith*[10] is resolved by the regulation stating that the failure to exercise a pre-1942 general power of appointment, or a complete release of such a power is not considered to be an exercise of a general power of appointment.[11] Contrary to the view taken in *Higgins v. Comm'r*,[12] if a pre-1942 general power of appointment is partially released so that it is not thereafter a general power of appointment, a subsequent exercise of the partially released power is not an exercise of a general power of appointment if the release occurs before the later of the following dates: (1) November 1, 1951; (2) If the possessor was under a legal disability to release the power on October 21, 1952, the day after the expiration of 6 months following the termination of such legal disability.[13] The exercise of a pre-1942 general power of appointment which is an exercise with regard to only a portion of the subject property, is considered to be a transfer of the value actually transferred. However, the power is considered as exercised upon all the property if the exercise creates or changes any beneficial interest in any particular property subject to the power.[14] The exercise, release or lapse (except partial releases or lapses) of a post-1942 general power of appointment is deemed to be a transfer by the possessor of the power.[15] If a post-1942 general power of appointment is partially released so that thereafter the donor may still appoint among a limited class of persons not including himself, the partial release is not an exercise of the general power of appointment,[16] In accord with *Morton's Estate v. Comm'r*,[17] if a post-1942 general power of appointment is partially released prior to June 1, 1951, so that it no longer represents a general power of appointment, the subsequent exercise, release or lapse of the partially released power at any time thereafter will not constitute the exercise or release of a general power of appointment.[18] A disclaimer or a renunciation of a post-1942 general power of appointment will not be considered a release of the power.[19] A power by which the possessor can invade or consume the subject property is not treated as a general power of appointment, if it is limited by an ascertainable standard relating to the health, education, support or maintenance of the possessor.[20] A pre-1942 power of appointment will not be

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[8]Id., § 25.2514-2 (d). This provision rejects the view taken in Comm'r v. Walston, supra note 1, and accepts that taken in Cerf v. Comm'r, 141 F.2d 564 (3rd Cir. 1944).

[9]151 F.2d 211 (2nd Cir. 1945).

[10]138 F.2d 956 (7th Cir. 1943).

[11]Id., § 25.2514-2 (c).

[12]129 F.2d 237 (1st Cir. 1942).

[13]Id., § 25.2514-2 (d). The power to release, revoke or amend is governed by local property law. Noble v. Rogan, 49 F. Supp. 370 (D. Cal. 1943).

[14]Id., § 25.2514-2 (e).

[15]Id., § 25.2514-3 (a).

[16]Id., § 25.2514-3 (d) (1).

[17]12 T.C. 380 (1949).

[18]Id., § 25.2514-3 (c) (2). If a post-1942 general power of appointment is partially released after May 31, 1951, the subsequent exercise, release, or lapse of the power at any time will constitute an exercise or release of a general power of appointment. Id., § 25.2514-3 (c) (3).

[19]The disclaimer or renunciation must be unequivocal and effective under local property law. Id., § 25.2514-3 (c) (5).

[20]The power will be limited by an ascertainable standard if the extent of the possessor's duty to exercise or not to exercise the power is reasonably measurable in

considered a general power of appointment if it is exercisable by the possessor only in conjunction with another person.[21] In accord with *Comm'r v. Prouty*,[22] a post-1942 power of appointment will not be considered as a general power of appointment, if the possessor of the power can exercise the power only with the consent or joinder of the donor of the property or of a person having a substantial interest in the subject property which is adverse to the exercise of the power in favor of the possessor, his estate, his creditors or the creditors of his estates. If the power can be exercised without the consent of the donor or a person having a substantial interest in the subject property, it will be taxable as a general power of appointment.[23]

Harry L. Schroeder

TORTS — AUTOMOBILES — LIABILITY OF OWNER WHERE KEY NOT REMOVED AND THIEF CAUSES INJURY IN A COLLISION

Appellant automobile passenger sued appellee for damages for personal injuries sustained by him when the automobile in which he was riding was struck at an intersection by an automobile owned by the appellee and driven by a third person who had just stolen the automobile. Appellee had left the car unattended in front of his place of business with the key in the ignition and unattended in violation of statute.[1] Appellee's demurrer to the declaration was sustained, and appellant declined to plead further, resulting in a dismissal of the suit. HELD: Affirmed. The declaration failed to state a cause of action in negligence predicated on the statute, in view of the fact that the act of the thief was an intervening agency which caused the injury, superseding the original act of negligence of appellee. *Permenter v. Milner Chevrolet Co.*, 91 So.2d 243 (Miss. 1956).[2]

This case is of unique interest in this jurisdiction since it is the first in Mississippi dealing with the statute. The decision is in accord with the rule of the majority of jurisdictions that the intervening act of the

terms of his needs for health, education, or support, or any combination of them. This relates to both post and pre-1942 powers. Id., § 25.2514-1 (b) (2).

[21]Int. Rev. Code of 1954, § 2514 (c) (2).

[22]115 F.2d 331 (1st Cir. 1940).

[23]Id., § 25.2514-1 (b) (2). If the general power of appointment can only be exercised at the consent of others, the possessor will be treated as making a gift of only a fraction of the property, equal to the value of the property divided by the number made up of the possessor and those who must concur in the exercise of the power. Id., § 25.2514-3 (b).

[1]Miss. Code Ann., § 8219 (1942). Unattended motor vehicle. — No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway.

[2]Holmes, Lee, and Arrington, J.J. dissented on the ground that whether the thief's act in stealing the automobile and driving it recklessly might reasonably have been anticipated by the appellee was a question for determination of the jury under all the facts and circumstances.

thief is the proximate cause of the injury.[3] The contrary view has been accepted by only two jurisdictions,[4] where the reasoning is that injury initiated by a violation of the statute is embraced within its terms.[5] Whether the statute be construed as an anti-theft measure[6] or a public safety measure,[7] or whether no statute is involved,[8] the considerations appear to be the same under the majority rule. The underlying theory of this rule is that notwithstanding negligence on the part of the owner of the automobile, the subsequent theft is unforeseeable,[9] and therefore is an intervening cause sufficient to disrupt the original chain of causation.[10] Normally the courts have imposed a duty to foresee certain lawful acts of responsible third parties,[11] intermeddling by mischievious children,[12] or acts of curious adults around construction machines where the owner was actually aware of their presence.[13] However, in none of the majority decisions has the owner's failure to remove the ignition key been deemed the probable or proximate cause of subsequent injury inflicted by a thief. In many instances, as in the principal case, the questions of proximate cause or foreseeability have not been allowed to go to the jury,[14] although the Massachusetts court has indicated that injury resulting from the combined effects of wrongdoing by the owner and the thief could state a cause of action.[15] The majority is adamant in protecting the owner from liability, whether the injury to the third person occurs during the actual

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[3]Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954); Castay v. Katz & Besthoff, 148 So. 76 (La. App. 1933); Galbraith v. Lewin, 323 Mass. 255, 81 N.E.2d 560 (1948); Roberts v. Lundy, 301 Mich. 726, 4 N.W.2d 74 (1942); Anderson v. Theisin, 231 Minn. 369, 43 N.W.2d 272 (1950); Gower v. Lamb, 282 S.W.2d 867, (Mo. App. 1955); Reti v. Vaneska, Inc., 14 N.J. Super. 94, 81 A.2d 377 (1951); Teague v. Pritchard, 279 S.W.2d 706 (Tenn. App. 1954).

[4]Illinois and the District of Columbia. R. W. Claxton, Inc. v. Schoff, 169 F.2d 303 (D.C. Cir. 1948); Ross v. Hartman, 139 F.2d 14, 158 A.L.R. 1370 (D.C. Cir. 1943); Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d (1954). See note, 8 Okla. L. Rev. 371 (1955).

[5]Ross v. Hartman, supra note 4.

[6]Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945). "It is one thing to say that the ordinance was designed to prevent thefts and quite another to say that it is aimed at preventing negligent driving from the scene of the theft."

[7]Galbraith v. Lewin, 323 Mass. 255, 81 N.E.2d 560 (1948).

[8]Castay v. Katz & Besthoff, 148 So. 76 (La. App. 1933).

[9]Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954): "By leaving the key in the car the owner does not assure that it will be driven as he does when he lends it to another. At most he creates a risk that it will be stolen and driven. The risk that it will be negligently driven is thus materially less than in the case in which the owner entrusts his car to another for the very purpose of the latter's use." See note, 24 Tenn. L. Rev. 395 (1956).

[10]Maggiore v. Laundry & Dry Cleaning Service, Inc., 150 So. 394 (La. App. 1933). "Assuming for the sake of argument that the leaving of the key in the ignition switch did constitute negligence on the part of the defendants, we are still inclined to believe that under the circumstances in the instant case, that the intervening act of Wilson was sufficient to break the sequence of defendant's negligence so as to establish the intervening cause as the efficient or proximate cause of the accident."

[11]Maggiore v. Laundry & Dry Cleaning Service, Inc., supra note 10.

[12]Walter v. Bond, 292 N.Y. 574, 54 N.E.2d 691 (1944).

[13]Zucker v. Clarkson Construction Co., 363 Mo. 352, 251 S.W.2d 52 (1953); noted in 18 Mo. L. Rev. 205 (1953).

[14]Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954) (nonsuit granted); Kiste v. Red Cab Co., 122 Ind. App. 587, 106 N.E.2d 395 (1952) (demurrer sustained). But see Annot., 140 A.L.R. 534 (1942); Anderson v. Theisin, 231 Minn. 369, 43 N.W.2d 272 (1950) (demurrer sustained); Grower v. Lamb, 282 S.W.2d 867 (Mo. App. 1955) (directed verdict for defendant).

[15]Malloy v. Newman, 310 Mass. 269, 37 N.E.2d 1001 (1941).

flight of the thief from the scene of the crime or several hours later.[16] And the courts agree that if the negligence complained of in a declaration is the violation of a common law *or* statutory duty, it must nonetheless be the direct and proximate cause for the action to lie.[17] The question in point has recently been approached in Kentucky, and the succinct opinion by the court, holding that the owner had no duty to anticipate the theft and subsequent injuries, seems to indicate that the law is becoming increasingly settled.[18]

In light of the decision in the principal case it is difficult to imagine a similar situation arising in this jurisdiction where the plaintiff will be able to get to the jury. For it is apparent that a third person must intervene, and his act probably will be held, for the purpose of demurrer, to be the proximate cause of the injury, insulating the owner from liability. There seems to be no reason for the Mississippi court to regress legally along the more socially acceptable (to the plaintiff) reasoning of the minority. However, it is submitted that the latter portion[19] of the Mississippi statute in question will give rise to more debatable litigation, for there is prospect of injury without an intervening act. In considering this question the courts look to the degree of care required of an owner leaving his automobile in a particular position. Decisions in other jurisdictions indicate that factual situations can be anticipated where the issue of foreseeability will be presented to the jury.[20]

James A. Becker, Jr.

Workmen's Compensation — Aggravation of Pre-existing Physical Condition

Bryant, a regular employee of the defendant, was injured in the course of his employment when the boom of a winch fell and struck him on the left side of his back. Subsequently, a large, hard, immovable mass developed in the area of the injury, and sixteen days after the mishap, the growth was excised. Approximately four months later, Bryant died. In a proceeding under the Workmen's Compensation Act[1] an award for the death was allowed by the attorney-referee. The Workmen's Compensation Commission and the circuit court affirmed the award, and the defendant appealed. Held: Trauma to employee's back aggravated, accelerated or combined with a pre-existing cancerous condition to produce death, and death was compensable. *Dixie Pine Products Co. v. Dependents of Bryant,* 89 So.2d 589 (Miss. 1956).

16Anderson v. Theisin, 231 Minn. 369, 43 N.W.2d 272 (1950) (injury occurred during flight); Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948) (injury occurred several hours after the theft), noted in 8 Okla. L. Rev. 371 (1955).

17See 38 Am. Jur. 837, Negligence, § 166, cited in the instant case.

18Frank v. Ralston, 145 F. Supp. 294 (W.D. Ky. 1956).

19See supra note 1.

20Annot., 16 A.L.R. 2d 979 (1951).

1Miss. Code Ann. §§ 6998-01 to -59 (1942).

It is well established in Mississippi that a pre-existing disease or infirmity of the employee does not disqualify a claim under the statutory requirement[2] that the injury or death must arise out of the employment, if the claimant can show that the employment lighted up, aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability.[3] It is not necessary that "accidental injury"[4] result suddenly or from the application of external force,[5] nor is it necessary that the exertion which concurred in precipitating the harm be beyond the normal routine of work.[6] Of course, in order for the injury to be compensable there must be a causal connection between the employee's disability and his work,[7] but the work need be only a contributing and not the sole cause of the injury.[8]

Employers are reluctant to hire persons with physical defects. This reluctance is based on the belief that hiring these persons would result in higher Workmen's Compensation costs since (1) these handicapped persons would be more accident-prone than physically fit employees, and (2) the defect might be aggravated or accelerated by an injury and result in a greater degree of disability than would normally have been produced. The best interest of society is served by the employment of handicapped persons, and this theory of public policy has been responsible for the enactment of Second Injury Fund Legislation.[9] The second injury fund, however, does not apply to persons with latent physical impair-

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[2]Miss. Code Ann. §§ 6998-02 and -04 (1942).

[3]Prentiss Truck and Tractor Co. v. Spencer, 87 So.2d 272 (Miss. 1956); Rolling v. Hatten and Davis Lumber Co., 85 So.2d 486 (Miss. 1956); Southern Engineering & Elec. Co. v. Chester, 83 So.2d 811 (Miss. 1955); Miss. Products, Inc. v. Gordy, 80 So.2d 793 (Miss. 1955); Miss. Federated Cooperatives v. Jefferson, 79 So.2d 723 (Miss. 1955); W. G. Avery Body Co. v. Hall, 79 So.2d 453 (Miss. 1955); Ingalls Shipbuilding Corp. v. Howell, 221 Miss. 824, 74 So.2d 863 (1954); Tate v. Dr. Pepper Bottling Co., 220 Miss. 311, 70 So.2d 602 (1954); East v. Pigford Bros. Const. Co., 219 Miss. 121, 86 So.2d 294 (1953); Federated Mut. Implement & Hardware Ins. Co. v. Spencer, 219 Miss. 68, 67 So.2d 878 (1953); Cowart v. Pearl River Tung Co., 218 Miss. 472, 67 So.2d 356 (1953); Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So.2d 645 (1952). See also 1 Larson, Workmen's Compensation Law § 12.20 (1952).

[4]" 'Injury' means accidental injury or accidental death arising out of and in the course of employment. . . ." Miss. Code Ann. § 6998-02 (1942).

[5]Hardin's Bakeries v. Ranager, 217 Miss. 463, 64 So.2d 705 (1953).

[6]W. G. Avery Body Co. v. Hall, 79 So.2d 453 (Miss. 1955), where the court stated further: "Provided the causal relation is shown, the exertion may be the usual and customary, and still satisfy the requirements that the injury be accidental and arise out of the employment." See also Tate v. Dr. Pepper Bottling Co., 220 Miss. 311, 70 So.2d 602 (1954); East v. Pigford Bros. Const. Co., 219 Miss. 121, 68 So.2d 294 (1953); Cowart v. Pearl River Tung Co., 218 Miss. 472, 67 So.2d 356 (1953); Ingalls Shipbuilding Corp. v. Byrd, 215 Miss. 234, 60 So.2d 645 (1952), where the court stated: "When usual exertion leads to something actually breaking, herniating, or letting go, with an obvious sudden mechanical or structural change in the body, the injury is accidental." For interpretations of accidental injury in other jurisdictions, see cases collected in 58 Am. Jur., Workmen's Compensation §§ 192-199 (1948) and 1 Larson, Workmen's Compensation Law, §§ 37-42 (1952).

[7]W. G. Avery Body Co. v. Hall, supra note 6.

[8]Miss. Products, Inc. v. Gordy, 80 So.2d 793 (Miss. 1955); Pearson v. Dixie Elec. Power Ass'n, 70 So.2d 6 (Miss. 1954); Cowart v. Pearl River Tung Co., 218 Miss. 472, 67 So.2d 356 (1953).

[9]Miss. Code Ann. § 6998-37 (1942).

ments.[10] It is therefore submitted that society would be benefited by the enactment of legislation, providing for a fund, similar to a second injury fund, from which awards for injuries resulting from these impairments could be paid.[11]

John M. Bee

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[10]Miss. Code Ann. § 6998-37 (1942) provides: "(a) If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently and totally incapacitated through the loss or loss of use of another member or organ, the employer shall be liable only for the compensation payable for such second injury. . . ."

[11]For possibilities concerning this type statute, see 8 Vand. L. Rev. 575.

RECENT BOOKS

MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS.

Proceedings of the Ninth Annual Meeting, National Academy of Arbitrators. Jean T. McKelvey, Editor. BNA, Inc. 1956. Pp. 237. $3.50.

The appearance of any book dealing with the subject of labor arbitration is an event for persons interested in this important area of economic decision-making. This new addition to the literature of labor arbitration contains several noteworthy contributions. There are three discussions reported consisting of principal speeches followed by comments. These make up about half the book. Next in importance are two items included in the appendix. There is a reprint of the late Harry Shulman's excellent article, "Reason, Contract, and the Law in Labor Relations" which first appeared in the Harvard Law Review.[1] The other item deserving special mention is the report of the Committee on Law and Legislation on the Proposed Uniform Arbitration Act. The rest of the volume contains cryptic summaries of workshops and mealtime speeches which make up a good part of the two and a half day meeting.

One sympathizes with Miss McKelvey for it would appear that she was faced with a difficult task in compiling the volume. The report of the Research and Education Committee,[2] of which the editor is chairman, states that the predecessor of the present volume[3] was distributed free to members of the Academy. Thus, it would seem that if this volume is to be distributed in the same way it is not only a book for general circulation, but it is serving as a printed record of the annual meeting of the Academy as well. This probably explains the presence of the workshop summaries, the program of the meeting, and the mealtime speeches. Harry Shulman's article is a valuable discussion of some important basic problems and contains many arresting thoughts by a man respected by all interested in arbitration. However, it appears from the committee report referred to above that reprints of this same article were circulated to all members of the Academy more than a year ago.

Professor Justin's discussion of arbitrability and jurisdiction is provocative. It is not as valuable to those not directly concerned with New York's statutory arbitration system, but nevertheless raises some generally controversial points. Much of the initial argument is based upon an assumed mutual agency of the arbitrator and a further assumption that an arbitrator should decide the merits of a case while finding the issue not arbitrable. Later discussion of stare decisis, the scope of the "no strike – no lockout" clause, and time limitations in the collective contract raises many interesting questions. Professor Davey's brief but pertinent remarks climax a worthwhile discussion.

In his paper, "Concepts of Industrial Discipline," Professor Myers does a comprehensive work in summarizing and pin-pointing present problems of discipline. Particularly interesting are his remarks upon the

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[1] 68 Harv. L. Rev. 999 (1955).
[2] P. 227.
[3] *Arbitration Today* (1955).

subject of the union's responsibility for discipline: "Narrowly viewed, the duty of the union in matters of industrial discipline is limited to protesting; but as an instrument of communication between supervision and employees over and above its policing function, it may be willing to help management in maintaining standards by advising a member that discipline will follow if he continues his substandard work." A troublesome matter is well handled in the discussion of employee extracurricular activity — that area where our public relations profession is having its effect on decision making. The discussion was concluded by Mr. Gabriel N. Alexander who discussed two very important and unsettled concepts. "Corrective discipline," the industrial community's parallel of the habitual offender statute, is well evaluated; and the discussion is ended with a summary of arguments about "negative leadership," the contemporary equivalent of the common law ideas of misfeasance and nonfeasance applied to unauthorized work stoppages.

The longest chapter and in many ways the most intriguing is chapter eight entitled "Management's Reserved Rights." I assume that the title of the volume was taken from this chapter. Herein are found two principal papers, one by James C. Phelps representing management and one by Arthur J. Goldberg representing unions. These papers are ably discussed in turn by Sidney A. Wolfe and Neil W. Chamberlain. The question discussed is whether management retains all powers and rights not specifically granted to the union by the collective contract. If all rights and duties are stated in the contract then the answer is obvious, but if this is not or cannot be done then the parties and eventually the arbitrators are once again sailing the familiar sea of uncertainty.

Appendix C contains a copy of the report of the Committee on Law and Legislation upon the subject of the proposed Uniform Arbitration Act. The committee takes no stand on the desirability of any legislation, but rather addresses itself to evaluation of the provisions of the presently proposed act. The committee feels that most sections of the act would do no harm, but there are a number of provisions with which the committee cannot agree. Therefore, they conclude that the act is subject to serious objection. The principal difficulty is in the provisions for judicial review of the arbitrator's award — they are too broad. If arbitration is a preliminary step to litigation it fails to accomplish its basic purpose of economic efficiency. With the views of the committee before the meeting the Academy went on record as opposed to the enactment of the Uniform Arbitration Act in its present form.[4]

In conclusion this reviewer would wholeheartedly recommend the volume as a valuable addition to the library of anyone concerned with industrial relations.

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[4]At the summer meeting 1956 the Commissioners on Uniform State Laws adopted certain changes in Sec. 12 of the proposed act. These changes only partially answer the objections raised by the committee report.

THE FEDERAL LOYALTY-SECURITY PROGRAM. Report of the Special Committee of the Association of the Bar of the City of New York. New York: Dodd, Mead & Company, 1956. Pp. 301. $5.00.

Lawyers more than any other group in our society have experienced a vague sense of uneasiness whenever the matter of the security program of the federal government has come up for discussion. This is as it should be, for common law lawyers are the inheritors and defenders of a great tradition of civil liberties reaching back to Coke and continuing through Holmes and Brandeis. Such concepts as due process, equal protection of the laws, prohibitions against double jeopardy, self incrimination and invasion of privacy, all of which have united to make the common law countries paramount defenders of the rights of the individual citizens against the state, have been forged out by countless lawyers and judges. But as all students of our civil rights cases know, the common law concedes no absolute rights and liberties to the individual but only relative ones.

The operation of the Loyalty-Security program of the federal government poses this question of relativity in a complex and vital form. What is at issue is the achievement of a proper balance between the liberties of the individual and the security of the state. Traditionally Americans have been hostile to government supervision of private belief, but twice in our history, as a result of two world wars, public opinion has been stampeded into a renunciation of this tradition and into an animated denunciation of the non-conformist and the political radical. This aberration became particularly severe with the wide spread recognition of the true nature and intent of the communist conspiracy following World War II. The government responded to this public pressure by the enactment of a series of statutes aimed at excluding from governmental service and defense industries persons whose loyalty to the United States was questionable. Whether in the implementation and development of this program, the basic reasonableness and necessity of which no one can challenge, we have disrupted the balance which should be maintained between liberty and security is the problem to which the Association of the Bar of the City of New York has addressed itself in the study at hand.

The report is limited to a consideration of the federal security program as it applies to civilian employees of the federal government. After a brief summation of the threat of communism to the American system of government the report enters upon a detailed analysis of the security programs, their evolution, structure, cost and achievements. This section of the book, together with Appendix B containing selections from the pertinent statutes and executive orders, constitutes a valuable overall view of the evolution of the program and of the means used to implement it.

In general the committee finds the program now in force to be necessary under present world conditions but in need of revision and alteration in certain areas. Of significance is the fact that the program originated as a stop gap measure to deal with a situation the complexities of which were only dimly seen. Since its inception the program has proliferated until there are today a series of agencies and a complexity of statutes and executive orders lacking in coordination. In the implementation of the program needless burdens have been placed upon the individual and

upon the free exchange of scientific information. The committee accordingly recommends that a Director of Personnel and Information Security be established and attached to the Executive Office of the President. His function is to be that of assuring uniformity in the application of the program and the maintenance of a constant overall supervision and review of its operation. While retaining most of the existing structure the committee advises the abolition of the Port Security Program on the grounds that it is significant only in time of war and difficult to enforce in time of peace in view of the decision in *Parker v. Lester.*

The Committee further recommends that the shifting standard for the determination of personnel security should be firmed up and suggests the following formulation as a guide:

> The personnel security standard shall be whether or not in the interests of the United States the employment or retention in employment of the individual is advisable. In applying this standard a balanced judgment shall be reached after giving due weight to all the evidence, both derogatory and favorable, to the nature of the position, and to the value of the individual to the public service.

The committee hopes that the application of this standard only to those positions which are actually sensitive will reduce the number of persons and agencies covered by the program and will still assure adequate protection of the national interests of the United States. The committee accepts the validity of the concept of "guilt by association" but tempers it by the requirement of evidence showing that the individual actually was aware and in agreement with the aims of the subversive individual group with which he was associated. The abolition of the present Attorney General's list is advocated unless it can be revised and modified by the deletions of archaic organizations and the granting to new listees of the right to a hearing prior to inclusion on the list. Further recommendations are made for the training of security personnel, the establishment of a central screening board in the Civil Service Commission, the payment of suspended employees pending disposition of charges against them, and the surrounding of the hearing with traditional protections of due process. In this connection the committee concedes the necessity of protecting the identity of under-cover informants of the FBI but urges that whenever possible the accused be confronted with the witnesses against him. To aid the accused in his defense it is recommended that limited power of subpoena be granted to him and that the government be granted similar power. The present requirement of successive security clearances as the employee moves from one agency to another should be abolished, a single basic clearance being substituted.

If these and other recommendations of the committee be carried out the result should be the stabilization of the federal security program on a basis compatible with the protection of the liberties of the citizen. The number of persons involved would be materially reduced from 6,000,000 to 1,500,000, the national security adequately safeguarded, the confidence of citizens in the loyalty of governmental employees reinforced, the free flow of scientific information assured, the frustrations and antagonism occasioned by the present program minimized, and above all the reputa-

tion of the United States amongst its allies and foreign "neutralists" enhanced.

The committee is to be commended for a thorough and painstaking analysis and for a reasoned and moderate report which, while taking into consideration the exigencies of existing security problems, still affirms the traditional respect for the individual and his liberties. Pragmatically minded as we Americans are we should welcome this study, which gives a blueprint for living under conditions never contemplated by our grandfathers. It is to be hoped that the committee's recommendations will be seriously considered by those who have the power to implement them in practice.

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THE LAWYERS' TREASURY. Edited by Eugene C. Gerhardt. New York: The Bobbs-Merrill Company, Inc., 1956. Pp. 520.

This anthology, selected from the pages of the American Bar Association Journal, contains literary works printed therein during the first forty years of the Journal's existence.

The preface states that the official family of the A.B.A. made the original nominations of articles to be considered and that the list of nominators included judges and lawyers of varying taste and background. Of more than one-hundred-twenty-five articles nominated, the board of editors elected the top forty-six by secret ballot, final decisions being made by the editor-in-chief, the editor-in-charge, and the publisher. Only a single article by any one author is included; the selections are limited to one article on any particular subject.

The "Lawyers' Treasury" is therefore the product of many authors; the selections have been made by a heterogeneous group of competent members of the legal profession; the result is a book which offers at least some reading of particular interest to anyone concerned with law.

Perhaps the greatest value of this work lies in the fact that it perpetuates and makes readily available competent and interesting legal articles to those of us who would otherwise probably never see them — an advantage to be appreciated by even those having ready access to complete files of the A.B.A. Journal.

The selections are on occasion stimulating; in general they are of interest. The limitation to one article on any one subject narrows the number of articles of specific appeal to any individual. However, the field of law itself is in a sense special, and thus all of the contents are of at least general interest to anyone who would choose this volume from a bookshelf.

The foreword by Tappan Gregory, member of the board of editors,

briefly relates the history of the Journal, its objectives and growth. The effect of this foreword is to increase the appreciation of the reader for the sincere efforts expended by a few for the benefit of the many.

When one considers that these articles were originally received into the pages of the Journal only after careful study by the editors and selection as the best of numerous works submitted, and then when it is further considered that this collection presents only forty-six of the large number of writings contained in a forty year total collection, it is obvious that the name "The Lawyers' Treasury" has been aptly chosen.

An effort to arrive at a classification of contents according to subject matter has produced the following.

The majority of writings are concerned with the historical background of substantive law and procedure; several articles discuss legal, political and social philosophy, past and present.

The remaining works constitute well presented dissertations on the judicial function, communism versus the constitution, effect of present day big business on the legal profession, international law, legal language, how to prepare and argue an appeal, how to prepare and argue a case in the trial court, legal education, understanding of the legal method, the effect of the legal mind on governmental operation and the attendant responsibilities, ethics, evidence, the appeal of law to young men, literature and lawyers, and biography.

Each article is preceded by a very brief biography of the author. A footnote indicates the source of the writing and the date of its publication in the A.B.A. Journal. While this may be a small matter, it is nevertheless essential to a proper understanding of the author's thoughts, inasmuch as time has altered situations and conditions prevalent at the period of composition.

The reviewer has dealt herein more with the mechanics of the "Treasury" than with the content. This is so because of the complete diversification of subject matter. No thread runs through the collection, no unity other than that the writings are all concerned with the law. To list those specific articles of particular appeal to the reviewer would be of no service. *De gustibus non est disputandum.*

However, please be advised that the undersigned at first reacted to the "Lawyers' Treasury" with enthusiasm; then, encountering a certain few articles which either failed to hold his interest or expressed views with which he disagreed, his interest waned. Further reading revived that initial interest and a careful review left this writer with the conviction that the "Lawyers' Treasury" is a most worthwhile collection that should be in the library of every lawyer and law student.

The "Treasury" is a book to be kept on the bedside table, a volume in which to browse. The reader can select a subject which titillates his current fancy, and thereby, sans necessity of mood adjustment, move easily into a pleasant and thought-provoking half hour or more of reading entertainment.

Occasionally, a man learned in his profession, a student seeking truth, expresses his findings for the benefit of his fellow lawyers. When such expression is reduced to succinct writing, devoid of efforts to astonish by display, the result is a thing of beauty.

Such articles do repose within the covers of "The Lawyers' Treasury"

They are not in such number as to deprive the reader of the pleasure of the hunt.

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THE PRACTICE OF UNIONISM. By Jack Bardash. New York: Harper & Brothers, 1956. Pp. 465. $5.00.

AFL-CIO: LABOR UNITED. By Arthur J. Goldberg. New York: McGraw-Hill, 1956. $5.00.

Until recent years, the typical Mississippi lawyer—or, for that matter, anyone else in the state—has had little occasion to delve into the area of labor relations and labor law. Such matters, being the natural concomitants of an industrial and urban economy, simply have not presented themselves to any substantial degree in an environment historically rural and agricultural. The circumstance, of course, has been true generally of the entire South. But in the past twenty-odd years, and particularly since the end of the war, the South has been caught up in a great industrial revolution. The transformation in some places has been rapid and dynamic, in other places by slower and more gradual processes.

This industrial revolution which has been remaking the face of the South has not had its most phenomenal manifestations in Mississippi. Yet even here the pattern is clear. The ratios of urban to rural population and of manufacturing to farm employment are on the steady increase, and can be expected to continue under the sustained effort of state and local governments to attract out-of-state capital. It is recognized that such advances in industrialization are essential if the state is not to decline in population and prosperity. An agricultural economy is simply not enough to sustain general prosperity; and employment displaced by farm mechanization will migrate to other states unless other opportunities are available here. Increased educational and training opportunities in Mississippi will only benefit others unless economic opportunities here are attractive enough to persuade those who are educated and trained to stay.

And yet it should also be recognized that when industry comes, the unions will not be far behind. All of a sudden a community — or a lawyer — is caught up in a welter of problems of labor relations and labor law for which there is no guide in previous experience. Action is then likely to be governed by predisposition. From all indications, there are many Mississippians whose attitude toward labor unions is one of suspicion — if not dislike — and fear — if not hatred. Just why such a feeling of aversion and hostility exists on such a wide-spread basis is beyond the experience, since industrialization and unionization are still in an embryonic stage in the state; and it is unrealistic to suppose that each in-scope of this review. It may be doubted, however, that it is based on

dividual attitude is the result of any objective study of unions and unionism. Indeed, it seems clear to this reviewer that neither sustained experience nor objective study will support any "devil" theory of unionism, but would on the contrary demonstrate that unions and management are fundamentally pretty much alike. Each has its reprehensible leaders and its anti-social practices, but these are the exception rather than the rule and do not detract from the basic truth that each primarily is a legitimate, respectable and important element in our private enterprise economy.

The two books under review are both written from a viewpoint favorable to labor.

Mr. Barbash is a teacher and writer in the field of labor, has been a union member himself, and has worked on the staff of the CIO. His book is a comprehensive survey of all the major aspects of unionism, general rather than legal in its treatment. He discusses why workers join unions and why they do not; how employees are organized into unions; the structure and government of unions; wages, hours, union security and other terms of collective bargaining; the administration and enforcement of collective bargaining contracts; strikes, picketing, and boycotts; why unions engage in political activity; the various activities in which unions engage; the matter of union leadership; unions and racketeering; and the problem of communists in unions. Although his background and experience make him friendly to union viewpoints, Mr. Barbash has managed to deal with all these matters in a restrained and largely objective manner, with the assertion of his own views and opinions kept to a minimum. And even if his book might seem like an apologia to others of different backgrounds and sympathies, anyone can profit from the mass of purely factual information which the author has included.

Probably the most significant development in the labor field in recent years is the merger of the AFL and the CIO, bringing together in one federation some 140 unions and roughly fifteen million members. Mr. Goldberg, formerly general counsel of the CIO and now special counsel for the AFL-CIO and general counsel for the United Steelworkers, was one of the principal architects of the new organization. In the first part of his book he summarizes briefly the history of the American labor movement: the reasons for the creation of the CIO in the middle thirties; the differences between the AFL and the CIO in the ensuing years and the various abortive attempts to achieve labor unity; finally the successful negotiations leading to the merger. This part of the book is pretty much straight and factual narrative.

Mr. Goldberg then moves into an analysis of the language of the constitution of the new federation in two succinct chapters, and discusses the implications of this language in another. He then devotes separate chapters to the labor monopoly question, the problems of communism and corruption in the labor movement, the question of discrimination, and the public policy of the new federation. In this latter part of the book the author does not hesitate to advance labor's opinions and arguments on these various controversial matters. Here labor's most skillful advocate shows his art of persuasion, and it is with the conclusions reached in these latter chapters that management representatives are most likely to find disagreement. And yet this book is not merely labor

propaganda; its approach is too rational and elevated and too clearly bespeaks real conviction on the part of the author. One senses, too, that at the same time Mr. Goldberg is seeking to convince the public that labor is a respectable and responsible asset to society, he is also speaking to the leaders of labor themselves and urging them to be so.

As the industrialization of the state continues, more and more lawyers and Mississippians generally are going to have to be living with and dealing with unions and with matters of labor relations and labor law. Lawyers and others who wish to attain a fair and reasoned opinion of unions will not, of course, confine their inquiries to the anti-union side of the argument. If our reaction to unions is to be one of opposition, then at least let it be intelligent; if we are to be biased, then at least let us be informed.

William P. Murphy
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Errata

Contracts and Conveyances of Real Property by Milton R. Friedman was reviewed in the December 1956 issue, and the price was quoted as $4.25. The correct price is $12.00, including 1956 pocket supplement.

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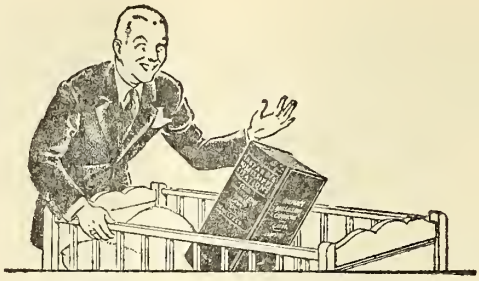

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